

# The National Labor Relations Act and Undocumented Workers: The De-Alienation of American Labor

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*This article examines the legal status and rights of undocumented workers under the National Labor Relations Act (NLRA). The author analyzes legislative policy and judicial decisions dealing with aliens and concludes that undocumented workers are within the coverage of the NLRA. The author next addresses the question of a possible antinomy between federal labor and immigration law, but concludes that the two bodies of law are consonant. Even if an antinomy exists, the author believes the principles of accommodation support protection of undocumented aliens under the NLRA. Finally, the article addresses the complicated problems involved in formulating appropriate remedies for undocumented workers when unfair labor practices occur.*

With the re-emergence of illegal immigration from Mexico<sup>1</sup> to the

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1. The undocumented immigrant population in the United States is composed of diverse groups with distinct demographic, historical, and economic characteristics. The dissimilarity within these national groups renders any generalized socio-historical discussion futile. Consequently, this article, in its socio-historical analysis, focuses on Mexican undocumented immigration for numerous reasons. First, Mexican workers have a long history of legal and illegal work-related migration to the United States. Second, the geographical proximity of Mexico has created unique migration patterns. For example, Mexican-origin immigrants constitute the largest national component of the undocumented population. Third, it has been argued that laws and administrative policies regulating Mexican immigration have differed significantly from those imposed on other na-

United States in the late sixties, "illegal aliens"<sup>2</sup> have once again become the source of serious social and political concern. Because this migration is fundamentally a movement of labor, it is not surprising that concern has been generated over the impact of undocumented workers on the United States labor market. Consistent with past political practices during recessionary times, undocumented persons are currently blamed for the high rate of unemployment and are accused of depressing wages and working conditions.<sup>3</sup> Ironically, organizing efforts by undocumented workers to improve wages and working conditions, often in combination with native workers, are frequently frustrated by employer manipulation of the ambiguities in labor law and the Immigration and Naturalization Service's (INS) enforcement policy. The ambivalent extra-legal status of these workers often obfuscates their rights under the National Labor Relations Act (NLRA),<sup>4</sup> frequently to the benefit of their employers. Consequently, an analysis of their precise status and protection under la-

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tionalties and make up a pattern of their own. On this latter point see Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66 (1975).

2. The term "illegal alien" is rejected as a proper term for persons present in the United States without proper authority. While the term is objectionable because of its unwarranted connotations of criminality, this article oppugns the use of the term on explicitly legal grounds. The term "illegal alien" is not found in the text of United States immigration law, and it bears no rational relationship to the categories of immigrants created by the Immigration and Nationality Act of 1952 (INA) or its attending regulations. Immigration and Nationality Act, §§ 101-250, 8 U.S.C. §§ 1101-1260 (1982); 8 C.F.R. §§ 1.1-499.1 (1983). Instead, a person's legal authority to retain residence in the United States is determined by the deportation statutes and related regulations. Brief for Appellees at 1 n.1, *Texas v. Undocumented Alien Children*, No. 80-1934 (*Texas* was consolidated with *Plyler v. Doe*, 457 U.S. 202 (1982)). Since the INA contains various provisions allowing for the suspension of deportation, the issue of deportability goes beyond the legality of the persons's entry. See Mitang, *Alternatives To Deportation: Relief Provisions of the Immigration and Nationality Act*, 8 U.C.D. L. REV. 323 (1975). Until a competent magistrate determines that a person is deportable, the person retains the right to continue residing in the United States. Accordingly, the court in *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 573 n.12 (D.D.C. 1980), *appeal dismissed*, 447 U.S. 916 (1980), *aff'd mem.*, No. 80-1246 (D.C. Cir. Nov. 6, 1980), *cert. denied*, 49 U.S.L.W. 3710 (U.S. Mar. 23, 1981) (No. 80-975) recognized that:

[T]he very concept of "illegal alien" amounts only to a vague notion of a person who might be deported if his or her presence were known to the authorities. But the determination of that legal fact can be a complicated process, as our numerous cases involving attempts by the INS to deport residents of this country demonstrate. The Immigration & Nationality Act is long and complex, full of provisos and exceptions.

3. See, e.g., *Welfare System a Haven for Illegal Aliens*, Chi. Trib., Apr. 12, 1981, at 16, col. 1; *Drain By Illegal Aliens on Welfare Claimed*, Hous. Chron., Oct. 11, 1982, at 4, col. 1; *Experts See More Job Woes if Immigration Bill Fails*, Hous. Chron., Dec. 8, 1982, at 8, col. 1.

4. 29 U.S.C. §§ 151-168 (1976 & Supp. V 1981). The NLRA was amended by the Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1976 & Supp. V 1981)). The NLRA was also amended by the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

bor law doctrine and immigration law is essential to any effort to improve the terms of employment and working conditions of both domestic and undocumented workers.

This article analyzes the status of undocumented workers under the NLRA. The discussion commences with an assessment of the evolving relationship between Mexican undocumented workers and American trade unions, and includes a survey of demographic, sociological, and labor market attributes of the contemporary migration flow. The analysis proceeds to an examination of the INS' practice of policing undocumented workers at the jobsite. This brief exposition will focus on how INS factory raids have been manipulated by employers to thwart organizing campaigns. The substance of the article will concern itself with a legal investigation of specific NLRA provisions as they relate to undocumented workers. The threshold question of whether the undocumented worker is an "employee" within the definition of the NLRA is analyzed. Also examined under extant law is the question of whether employer disclosures of illegal immigration status to the INS, resulting in interference with concerted activity, constitutes an unfair labor practice. Finally, the problems involved in fashioning appropriate labor law remedies for workers with extra-legal status are explored.

#### TRADE UNIONS AND SOCIO-DEMOGRAPHIC IMPACT: AN OVERVIEW

Participants in the illegal migration flow from Mexico are deemed a "social problem" because of the widely-held belief that they have an adverse economic and social effect on United States society. The primary untoward results of undocumented immigration are said to be: (1) the displacement of native workers, (2) the depressing of wages and working conditions, and (3) the draining of public assistance funds.<sup>5</sup> Many argue that these, and myriad other social problems, are exacerbated by an undocumented population number-

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5. The Simpson-Mazzoli bill is the most prominent proposed legislation premised on these concerns. The bill was introduced in 1982 as the Immigration Reform and Control Act of 1982, S. 2222, 97th Cong., 2d Sess.; H.R. 6514, 97th Cong., 2d Sess. For a summary of the bill see H.R. REP. NO. 890 (pt. 1), 97th Cong., 2d Sess. (1982). S. 2222 passed in the Senate, but H.R. 6514 did not pass in the House of Representatives. See Hous. Chron., July 20, 1983, at 3, col. 2. The bill was reintroduced in the 98th Congress (1983) in slightly different form as the Immigration Reform and Control Act of 1983. S. 529, 98th Cong., 1st Sess.; H.R. 1510, 98th Cong., 1st Sess. (1983). S. 529 passed in the Senate, but H.R. 1510 once again has stalled in the House of Representatives. See *House Democrats Block Immigration Law Revision*, Hous. Chron., Oct. 2, 1983, at 31, col. 1.

ing in the millions, and augmented by additional millions each year.<sup>6</sup>

These allegations of negative social impact must be examined under the critical light shed by recent economic and sociological investigations.<sup>7</sup> Before analyzing these accusations, however, the historical relationship and current developments between the United States trade unions and undocumented workers will be explored.

### *Trade Unions and Undocumented Workers: History and Current Developments*

The genesis of the trade union movement in the United States can be traced back to the inception of massive Southern and Eastern European migration in the 1870's.<sup>8</sup> During the early years of the labor movement, immigrants were assailed for organizing unions which were considered inimical to the American "way of life." Paradoxically, by the turn of the century, immigrants were being criticized for *not* joining unions and were blamed for the harsh living and working conditions of the time.<sup>9</sup> Some evidence suggests that in the late nineteenth century employers devised a conscious plan to recruit immigrant labor as a means of undermining the incipient organizing efforts of domestic workers. Employers pitted "new" immigrant labor against "old" immigrant labor, by blaming low wages and poor working conditions on the newly arrived immigrants.<sup>10</sup> The American Federation of Labor (AFL), with its focus on organizing skilled labor, appears to have readily accepted the employers' rationale. The AFL adopted the stance that "new" immigrants could not be organ-

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6. See generally Chapman, *A Look at Illegal Immigration Causes and Impact on the United States*, 13 SAN DIEGO L. REV. 34 (1975). The author, a former commissioner of the INS, speculates on the negative social consequences of the "increasing" undocumented person population.

7. The highly disjointed and tendentious nature of much of the research on immigration makes my selection of sources critical. My analysis will rely primarily on the following sources because these works constitute some of the most current and extensive treatments on the subject: D. NORTH & M. HOUSTON, *THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY* (1976); M. VILLALPANDO, *A STUDY OF THE SOCIOECONOMIC IMPACT OF ILLEGAL ALIENS ON THE COUNTY OF SAN DIEGO* (1977); W. CORNELIUS, *MEXICAN MIGRATION TO THE UNITED STATES: CAUSES, CONSEQUENCES AND U.S. RESPONSES* (1978).

8. See I. HOURWICH, *IMMIGRATION AND LABOR* 30-31 (1912) (during the first decade of the new migration, 1880-1890, more labor unions were organized than throughout the previous history of the United States).

9. Bustamante, *The Historical Context of Undocumented Mexican Immigration to the United States*, 3 AZTLAN 261, 265 (1972). This article uses a comparative analysis, placing Mexican immigration in the context of general United States immigration history, and thereby simultaneously identifying ideological, social, and economic elements common to all immigrant groups, and constraining structural features peculiar to Mexican workers.

10. For an excellent historical analysis of the organizing efforts by immigrants see Lopez, *Undocumented Mexican Migration: In Search of A Just Immigration Law and Policy*, 28 U.C.L.A. L. REV. 615, 641-672 (1981).

ized and were therefore causing the abject conditions facing the United States working class.<sup>11</sup>

The United States labor movement has applied this position to Mexican immigrants. It has held steadfast to the notion that the Mexican worker (irrespective of legal status) is so tractable and supine as to be virtually unorganizable. From this premise organized labor has labeled the Mexican worker a "menace to American labor"<sup>12</sup> and has incessantly called for his deportation. AFL leaders were in the forefront of restrictionist campaigns in the 1930's and were among the most vocal proponents of the Mexican "repatriation" efforts of 1920-21 and the 1930's.<sup>13</sup>

The enmity felt by the trade union movement toward Mexican workers manifested itself in their exclusion from union membership. This exclusion was sometimes effected by requiring Mexican workers to become United States citizens before they were allowed to join.<sup>14</sup> The hostility of the United States trade union movement continues to the present and statements condemning undocumented workers as the bane of native workers are still standard fare at the AFL-CIO conventions.

This stereotypic conception of Mexican "docility" runs contrary to historical research documenting Mexican labor militancy. As early as 1903, Mexican workers led major campaigns including the 1903

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11. The attitude of the AFL has been described as follows:

The A. F. of L. leaders were hardly interested in organizing these newly arrived immigrants; they adopted the attitude that it was best for the Federation "to permit the newcomers to sink or swim by themselves." At the same time, they advanced the thesis that they could not be organized; unlike the "old" immigrants, they were "a heterogeneous stew of divergent and discordant customs, languages, institutions; and they were impossible to assimilate or unionize." They cut wages because they were satisfied with conditions that neither the native American workers nor the "older" immigrants would tolerate. They came not to settle permanently, to take root in America, but to earn a few dollars, primarily through strikebreaking, and return home.

3 P. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 258 (1964), cited in Lopez, *supra* note 10, at 647 n.166.

12. See M. REISLER, *BY THE SWEAT OF THEIR BROW* 68 (1976). This attitude of organized labor persists today. One study indicates that 72% of union leaders believe that undocumented workers "take Americans' jobs." Hous. Chron., Nov. 17, 1982, at 4, col. 1.

13. See A. HOFFMAN, *UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION* 29-30 (1974) (an excellent treatment of the mass deportations of the late twenties and early thirties).

14. As early as 1921, the AFL used citizenship requirements as a discriminatory tactic. For a general discussion of the AFL position with regard to Mexican immigration of the 1920's see Levenstein, *The AFL and Mexican Immigration in the 1920's: An Experiment in Labor Diplomacy*, 48 *HISPANIC AM. HIST. REV.* 206 (1968).

Pacific Electric Railroad strike in Los Angeles and the Clifton-Morenci miners strike in Arizona.<sup>15</sup> Chicano and *Mexicano*<sup>16</sup> workers have well-documented participation in strike activity throughout the 1900's leading up to the present. Social investigators have noted that Mexican workers readily join unions when urged to do so and, in various instances, they have even mounted organizing campaigns on their own.<sup>17</sup>

Recent empirical research on union participation by Mexican undocumented workers also appears to contradict the longstanding AFL-CIO position that these workers are unorganizable. Social research discloses that approximately ten percent of all undocumented workers in the United States are union members.<sup>18</sup> This percentage is high considering the general economic vulnerability of all workers and, particularly in the case of undocumented workers, the very real potential of deportation. Nevertheless, the membership rate could be even higher if undocumented workers were not ignored or excluded by labor organizations. In Los Angeles, for example, where some unions are making an effort to organize these workers, informal evidence reveals that approximately thirty percent of all undocumented workers belong to unions.<sup>19</sup> This estrangement between the American labor movement and the Mexican worker may be ending given the following factors: 1) the organized portion of the labor force has dropped from forty percent thirty years ago, to below twenty-four percent at present, and thus the undocumented worker is viewed as a reserve of untapped labor; 2) the undocumented worker's presence in certain economic sectors (i.e., needle trades, restaurants, farm labor) is so pervasive that the very existence of unions in these sectors requires that they organize the foreign worker; and 3) undocumented workers often perceived unions as the only safe civil institution that

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15. See Wollenberg, *Working on El Traque: The Pacific Electric Strike of 1903*, in THE CHICANO 96 (M. Hundley ed. 1975). See also Gomez-Quinones, *The First Steps: Chicano Labor Conflict and Organizing, 1900-1920*, 3 AZTLAN 13, 26-35 (1973).

16. The term "Chicano" refers to persons of Mexican origin who reside permanently in the United States and is thus synonymous with "Mexican American." The term "Mexican" or "*Mexicano*" when used to refer to persons in the Southwest, means persons from Mexico who are in the United States temporarily or on an irregular status. Legal, social, and historical complexities preclude the drawing of a glaring line between the two. Unless otherwise specified, "Chicano" will refer to both groups. See M. BARRERA, *RACE AND CLASS IN THE SOUTHWEST* 4 (1979).

17. W. CORNELIUS, *supra* note 7, at 71-74.

18. *Id.* at 71. In commenting on this percentage, Cornelius states that "during the past 57 years 'Big Labor' in the United States seems to have done everything within its power to alienate Mexican workers. That even nine or ten percent of them have joined United States unions is remarkable, given the indifference or hostility of most union leaders." *Id.* at 74.

19. R. LOUV, *THE MEXICAN MIGRATION: SOUTHWIND* 59 (1980) (compilation of a series of articles for The San Diego Union).

can help them fight specific workplace abuses.<sup>20</sup> Illustrative of a potential shift in trade union policy are the successful attempts at organizing undocumented workers by the International Ladies' Garment Workers' Union, the United Farm Workers' Union, and the International Longshoremen's and Warehousemen's Union.<sup>21</sup>

The increasing unionization of undocumented workers has the potential of significantly altering the terms of the current "illegal alien" debate.<sup>22</sup> The unionization of undocumented workers could limit the exploitation of these workers and protect their labor and immigration rights.<sup>23</sup> This movement could also improve conditions for low-wage, native-born workers and indirectly attract more domestic workers to the unskilled labor market. Its most fundamental impact, however, is that unionization could decrease the pull of undocumented labor into the United States because these workers could command wages equivalent to those paid domestic workers, thus eliminating the incentive for employers to hire them.

When efforts to organize undocumented workers materialize, novel legal questions will be placed before the NLRB. Employers will no doubt resist such efforts because the economic and political vulnerability of the "illegal" is exactly what makes him attractive as a laborer. Amid this clash of economic interests the NLRB will be petitioned to stake out new legal terrain, and the rights accorded under the NLRA will have to be reconciled with the immigration laws of this country.

### *The Size of the Undocumented Mexican Population*

Exaggerated estimates of the size of the undocumented population in the United States have been used persistently to inflame public

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20. For a general discussion of trade unions and undocumented workers in the urban context see NORTH AMERICAN CONGRESS ON LATIN AMERICA, UNDOCUMENTED WORKERS IN NEW YORK CITY (1979).

21. The United Auto Workers' Union (UAW) has also been active in organizing undocumented workers in the Southern California area. For an interesting account of an organizing meeting held by the UAW see LOUV, *supra* note 19, at 59-60.

22. The trend toward unionization of undocumented workers could be the most significant development in the 1980's. The traditional arguments suggesting that these workers depress wages and working conditions and live off the public dole can be addressed by unionization. Union representation would minimize the depression of wages and conditions of employment and union benefit, and health plans should reduce the already negligible use of social services.

23. The International Ladies' Garment Workers' Union has taken an affirmative stand on the issue of protecting the immigration rights of its workers by offering legal advice on rights, residency, and the procurement of citizenship. It also provides assistance in deportation hearings. Wall St. J., Dec. 7, 1982, at 1, col. 5.

opinion. Shrill statements by chief government officials declaring that thirteen million undocumented persons reside in this country have been used to support repressive legislation and a larger INS budget.<sup>24</sup> The clandestine nature of this migration makes it impossible to estimate the number of undocumented persons with any degree of precision; nonetheless, current research on this question suggests that the undocumented population is much smaller than the figures bandied about in the media.<sup>25</sup>

Perhaps the fundamental flaw in official "guess-estimates" of the size of the undocumented population is that they fail to consider *return* migration. Thus, the guess that a million undocumented persons reside in the United States in a given year is compounded by the guess that two million more will immigrate next year. This serious methodological error often results in absurdities. For instance, a 5.2 million estimate of permanent-resident undocumented Mexicans would require that all 15- to 44-year-old males enumerated in the 1970 Mexican census in the six principal sending states<sup>26</sup> of Mexico had migrated permanently to the United States by 1975.<sup>27</sup> All field studies done in Mexican sending communities during the past twelve years have found, however, that the pattern of emigration to the United States remains predominantly temporary. In his field studies of northeast Jalisco, Professor Cornelius found that "temporary migrants to the United States outnumbered those who settled permanently in the United States by a margin of 8 to 1, during the period from 1930 to 1976."<sup>28</sup> David Heer, researcher at the University of Southern California, recently estimated the net annual flow of undocumented Mexican immigrants at 82,000 to 130,000 per year and these figures may be upwardly biased.<sup>29</sup>

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24. See generally, Cardenas, *Public Data On Mexican Immigration into the United States*, in CURRENT ISSUES IN SOCIAL POLICY 127 (W. Littrell, G. Sjoberg ed. 1976); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PRELIMINARY REVIEW OF EXISTING STUDIES OF THE NUMBER OF ILLEGAL RESIDENTS IN THE UNITED STATES (1980). The report reviews existing studies of the number of undocumented persons in the United States and it advances population estimates based on their content.

25. See, e.g., Geyer, *Illegal Aliens Endangering U.S. Ideals*, Hous. Post, Dec. 4, 1982, at 2B, col. 2 (estimating 9 to 11 million undocumented persons); Malone, *Immigration: Reform Package Gathers Set of Foes From Left, Right*, Hous. Post, May 27, 1983, at 2B, col. 2 (estimating the undocumented population ranges from 2 to 12 million).

26. The majority of contemporary immigrants continue to come from the six principal sending states: Durango, Guanajuato, Jalisco, Michoacán, San Luis, Potosi, and Zacatecas. H. CROSS & J. SANDOS, *ACROSS THE BORDER* 76-77 (1981).

27. W. CORNELIUS, *supra* note 7, at 12.

28. *Id.* at 25.

29. Heer, *What is the Annual Net Flow of Undocumented Mexican Immigrants to the United States*, 16 DEMOGRAPHY 417 (1979); for recent Mexican estimates of the undocumented population see N.Y. Times, Oct. 13, 1980, at 3, col. 1.



*Displacement of Native Workers*

The central complaint lodged against undocumented workers is that their employment causes unemployment for native workers. This argument has been used for many years as a criticism of immigrant workers, and its validity has rarely been challenged. There is, however, no direct evidence of displacement caused by the employment of undocumented persons.<sup>30</sup>

Before elaborating on this contention it is important to understand the type of job occupied by an undocumented worker. INS statistics reflect that these workers take high-paying jobs; however, this appears to be more a function of INS enforcement tactics than a reflection of the jobs actually occupied by these workers. Independent research into the characteristics of the undocumented workers' employment uniformly reveals that the jobs they take require little or no technical skill; necessitate only a rudimentary command of English; involve physical, dirty, arduous tasks; offer little job security and little or no opportunity for advancement; and are usually located within marginal firms employing fifty or fewer workers.<sup>31</sup> Hence, undocumented workers are employed in what has been termed the secondary labor market.<sup>32</sup>

Noting that jobs occupied by undocumented persons are the least desirable to the native worker who, even if unemployed, may have more attractive alternatives for his sustenance, Professor Cornelius suggests that workers cannot be displaced if they are not there.<sup>33</sup> If illegal immigration were causing displacement, the areas where undocumented immigrants congregate would indicate a higher unemployment rate. However, the "sunbelt" states, having the largest concentration of undocumented workers, have the *lowest* unemployment rate.<sup>34</sup>

Consequently, a review of all social research on the question of displacement indicates an absence of evidence supporting its validity.

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30. W. CORNELIUS, *MEXICAN IMMIGRANTS AND SOUTHERN CALIFORNIA: A SUMMARY OF CURRENT KNOWLEDGE* 34-41 (1982).

31. W. CORNELIUS, *supra* note 30, at 29-34.

32. See generally M. PIRE, *UNDOCUMENTED WORKERS AND UNITED STATES IMMIGRATION POLICY* 1-7 (1977) (an excellent brief discussion of the secondary labor market and its role in the current migration phenomenon).

33. W. CORNELIUS, *supra* note 30, at 34-41.

34. See M. VILLALPANDO, *supra* note 7, at 62. Villalpando cites a recent INS project as illustrative of this proposition. The INS undertook active recruitment of native workers to fill 340 jobs opened up by the apprehension of undocumented workers. All jobs were eventually filled, but not with native workers: "90% of the positions were occupied by commuter workers from Baja California, Mexico." *Id.*

Even in the border area, where North and Houstoun suggest that undocumented workers may be having an adverse economic impact,<sup>35</sup> later research by Professor Gilbert Cardenas of Pan American University found that "there is no conclusive evidence that undocumented aliens have an impact on the border labor markets."<sup>36</sup> Arguments that blame the undocumented worker for high unemployment rates are speculative and unsupported by current social research.

### *Depressing Wages and Working Conditions*

A corollary of the job displacement thesis is the allegation that employment of undocumented persons depresses wages and causes poor working conditions. This contention has not been substantiated, and is weakened by results from studies reflecting that a relatively small portion of undocumented persons receive less than minimum wage.<sup>37</sup> Their employment does not appear to depress wages below the legal minimum to any great extent. Furthermore, the Cornelius study observed that undocumented persons are usually employed in small marginal firms and industries where the exploitation of undocumented labor is a financial *modus operandi*. Cornelius argues, therefore, that the removal of undocumented persons does not necessarily translate into more jobs or better working conditions for the native worker because these businesses may have no other alternatives available.<sup>38</sup>

If undocumented workers were removed, wages and working conditions would not necessarily be improved. The obvious alternatives open to a business are mechanization or, if it is unable to secure labor at prevailing wages and conditions, the business may simply cease to exist. Ironically, the removal of undocumented workers would probably result in the loss of employment by native workers. An editorial in *The Wall Street Journal* echoed this concern when it stated: "In a city like New York, which has been driving away business through high costs, the illegal may well be providing the margin for survival for entire sections of the economy . . . ."<sup>39</sup> In short, the removal of undocumented workers does not necessarily create more, or better, employment opportunities for native workers.

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35. D. NORTH & M. HOUSTOUN, *supra* note 7, at 159.

36. See Cardenas, *Mexican Immigration and the United States Labor Market*, AGENDA, Mar.-Apr. 1979, 28, 31.

37. For a summary of the average wage-per-hour for all three studies cited *supra* note 7, see W. CORNELIUS, *supra* note 30, at 13-14.

38. *Id.* at 11.

39. Wall St. J., June 21, 1977, at 8, col. 1.

*Public Assistance and Undocumented Persons*

Many of the past mass deportation efforts were legitimized by the argument that undocumented persons live off the public dole.<sup>40</sup> Current restrictionist legislative proposals are often supported by the same contention. The reality of the situation, however, is very different. At least six major field studies have found extremely low rates of utilization of public assistance programs by these persons.<sup>41</sup> Research in high impact areas found that undocumented persons represented a small percentage of the total welfare caseload.<sup>42</sup>

An often overlooked fact is that undocumented persons pay taxes through automatic wage deductions (they rarely file income tax returns), through sales tax on retail purchases, and through property tax calculated into rent payments. In San Diego County, Villalpando found that undocumented persons receive around \$2 million in public assistance; yet they contribute approximately \$48 million in tax funds.<sup>43</sup> Professor Cornelius argues that "Mexican migrants are clearly subsidizing the United States Social Security system to the tune of hundreds of millions of dollars per year. . . ."<sup>44</sup> Far from living off public assistance, undocumented persons are actually subsidizing the system.

## INS ENFORCEMENT POLICY AND UNION ORGANIZING ACTIVITY

An examination of the INS enforcement policy reveals that it is centered on the workplace. Its execution portends serious disruptions of union organizing activity or the breach of existing collective bargaining agreements. This section has two interrelated objectives: to document the existence of such a policy and to demonstrate through actual examples how INS factory raids have affected concerted activity. This documentation will assist in framing the more theoretical analysis to follow, and will demonstrate the need for a legal response to the recurring interference with legitimate efforts to resolve economic grievances.

The Border Patrol, established in 1924, is the enforcement branch

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40. C. McWILLIAMS, *Factories in the Fields* 129 (1939). The author suggests that the seemingly uncoerced "repatriation" may have resulted from threats to take unemployed Mexican workers off relief.

41. For a synthesis of the findings of these studies see W. CORNELIUS, *supra* note 7, at 84-90.

42. H. CROSS & J. SANDOS, *supra* note 26, at 101.

43. M. VILLALPANDO, *supra* note 7, at 57, 173.

44. W. CORNELIUS, *supra* note 7, at 88.

of the INS but its function is confined to the immediate border area. Once undocumented workers have gained access to the interior of the country, the task of detecting them falls on the investigative arm of the INS.<sup>45</sup> It is estimated that eighty-five percent of the enforcement personnel are located on the border, causing a strain on the minimal agents policing the interior.<sup>46</sup> To deal with this dilemma, the INS has implemented a policy with a premium on "volume," namely, dragnet raids with all the potential constitutional violations inextricably bound with such tactics.<sup>47</sup>

In the early seventies, the presence of undocumented workers in certain industrial sectors increased due to employers' efforts to counteract the economic downswing of the time. The Nixon administration reacted by ordering an intensification of its policy of residential raids, which entailed house searches and dragnets at theaters and sporting events.<sup>48</sup> During this same period the Chicano community had become increasingly politicized and certain unions abandoned their traditional anti-alien stance. The egregious violation of fundamental rights (i.e., house searches, indiscriminate interrogation of theater audiences) generated political concern over the plight of undocumented workers, and efforts to politically and legally defend them soon followed.<sup>49</sup>

Strident protests over these objectionable enforcement tactics compelled the Ford administration to call for a reduction of neighborhood raids while it conducted various studies on the question. This hiatus on residential raids, however, did not mean that other enforcement strategies would not be implemented. It soon became evident that a modulated strategy of dragnet *factory* raids was being effectuated. The "benefits" of this enforcement policy to the INS were many; two of the most important were a maximizing of efficiency (relatively few agents could contain hundreds of workers within the confines of a factory) and the lessening of political repercussions because the raids were conducted away from the Chicano community at a site where the privacy interests of the workers were minimal.<sup>50</sup>

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45. DOMESTIC COUNCIL COMM. ON ILLEGAL ALIENS, PRELIMINARY REPORT 73 (1976).

46. *Id.* at 81.

47. For a study of INS Area Control Operations and their impingement on statutory and constitutional rights of aliens and citizens see U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 79-95 (1980).

48. P. BAIRD & E. McCAUGHAN, *BEYOND THE BORDER* 156 (1979). The authors described the Nixon administration's policy of INS residential raids as follows: "On street corners, in theaters, and especially inside factories, thousands upon thousands of non-white persons were stopped, interrogated and then deported without a trial—including some United States citizens."

49. *Id.* at 163.

50. For a discussion on the impact of factory raids on union organizing efforts among undocumented workers see generally, *Undocumented Aliens: Hearings Before the*

The INS policy of policing the jobsite has resulted in employers calling in *la migra*<sup>51</sup> whenever their workers have indicated a desire to organize. Some union officials charge outright collusion between INS agents and employers, citing instances when only aliens who were union activists were picked up and deported.<sup>52</sup> It follows from the logic of the INS enforcement policy that it could be easily utilized as an intimidating and union-busting instrument.<sup>53</sup>

Examples of INS suspect timing of factory raids abound. One recent documented instance of such interference with organizing activities is the election-day raid at Lilli Diamond Originals. Lilli Diamond is a division of Campus Casuals, one of the fastest growing women's garment manufacturers, which experienced a thirty-three percent increase in gross sales and a sixty-two percent increase in net profits between 1973 and 1976.<sup>54</sup> The ethnic composition of the work force is estimated at ten to fifteen percent black and white workers, and twenty-five to thirty percent Asian. The bulk of the workers are Mexican or Central American. Over half of the Latinos were undocumented, as were a good percentage of the Asian workers.<sup>55</sup>

A unionization campaign was undertaken by the International Ladies' Garment Workers' Union (ILGWU) in October, 1976. The campaign was heated with accusations of unfair labor practices levied by both sides. At various company meetings and in individual conferences, management reminded the workers of their illegal status in the country. Eventually, an election date was set for Friday,

*Subcomm. on the Dep'ts of State, Justice, and Commerce, The Judiciary, and Related Agencies of the House Comm. on Appropriations, 95th Cong., 2nd Sess. 319 (1978) (statement of Carlos Vellanoweth).*

51. "La migra" is a vernacular term popularly used by Chicanos to refer to the INS and its agents. The term ostensibly derives from the Spanish-language equivalent of "immigration" (*inmigracion*).

52. Lindsey, *Unions Move to Organize Illegal Aliens in the West*, N.Y. Times, June 3, 1979, at 42, col. 5.

53. Jay Mazur, vice-president of the International Ladies' Garment Workers' Union (ILGWU) recently wrote:

[M]any employers have cleverly used the INS as insurance against union drives. In California, for instance, employers faced with union representation elections have frequently called in INS agents shortly before the voting. On election day many potential union supporters are either back in their home countries, or attempting to avoid deportation.

Mazur, *The Return of the Sweatshop*, THE NEW LEADER, Aug. 13, 1979, at 7.

54. For a discussion of the economic and political context of this unionization campaign and a description of INS tactics see Vasquez, *The Election Day Immigration Raid at Lilli Diamond Originals and the Response of the ILGWU in MEXICAN WOMEN IN THE UNITED STATES* 145 (M. Mora & A. Del Castillo ed. 1980).

55. *Id.*

January 14, 1977.<sup>56</sup>

On the eve of the election, INS agents detained two female workers, both of whom had signed authorization cards. The next day, shortly after 9:00 a.m., three immigration vans and six agents descended onto the premises. The agents arrested ten workers, all but one of whom were union supporters or members of the shop organizing committee. The selective nature of the arrests and the fact that pro-union workers received special home visits by INS agents indicated a degree of coordination between management and the Service.<sup>57</sup> Certainly, the timing of the raids (a day before and during the election) is suspect, and its chilling and intimidating effect on the workers is unmistakable.

The May 17, 1978, Sbicca Shoe Company raid represents another occasion of INS interference with efforts by undocumented workers to organize. After a bitter organizing campaign, the Los Angeles-based Retail Clerks Local 1428 lost a representational election by 10 votes out of over 700 cast and immediately filed numerous unfair labor practices charges. The next day the INS raided the factory and attempted to deport 120 of the workers.<sup>58</sup>

An unanticipated quick legal response by the union resulted in the issuing of a temporary restraining order preventing the undocumented workers' deportation. Of the 120 detained workers, 65 decided to retract their "voluntary departure."<sup>59</sup> The so-called *Sbicca* case<sup>60</sup> stands as one of the first attempts to compel the INS to establish deportability of people without the use of illegally obtained and coerced evidence. From a labor relations standpoint, it represents one of the first instances in which a union has come to the legal defense of undocumented workers engaged in concerted activity.

The remainder of the article will analyze the status of undocumented workers within existing labor law doctrine and immigration law mandates. This investigation will determine the privileges and protections extended by the NLRA to these workers.

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56. *Id.* at 146.

57. *Id.*

58. Bowman, *Sbicca Workers Winning — I.N.S. Reshuffling Deck*, IMMIGRATION NEWSLETTER, Nov. 1978 - Feb. 1979, at 5.

59. See 8 U.S.C. § 1254(e) (1982); 8 C.F.R. § 242.5 (1983). The grant of voluntary departure is legally significant in our analysis of the remedial powers of the Board. See *infra* note 240.

60. *Vallejo v. Sureck*, No. CV78-1912-WMB (C.D. Calif. Dec. 27, 1978) (order granting temporary restraining order).

## LABOR AND IMMIGRATION LAW INTERFACE

*Congruous Policies*

The examination of the status of undocumented workers under the NLRA has obvious immigration policy implications. The initial query is whether labor and immigration law confront each other in an irreconcilable antinomy on this question, or whether the respective policies are in accord. Assuming these policies are harmonious, do the policy foundations of immigration law foreclose the conferring of employee status on these workers? This section will analyze the labor law rationale for extending NLRA protection to undocumented workers. Also examined is the argument that immigration laws preclude such coverage.

## Labor Law Analysis

The ambiguous social and economic role of undocumented workers manifests itself in an ambivalent legal status that makes an analysis of their economic rights under the NLRA problematic. Although there are long-standing laws forbidding the entry and residence of undocumented persons in the country, the federal government has conveniently waived these laws when economically expedient, and employers have utilized the labor of millions of undocumented persons in total disregard of legal dictates.<sup>61</sup> The misconceived (but legally operative) notion that persons who violate the guidelines of the Immigration and Nationality Act (INA) on entry and residence into the United States are shorn of all civil rights holds sway in much of the legal analysis on this question. This misconception has resulted in undocumented persons being refused access to courts based on lack of standing solely because of their "illegal" status.<sup>62</sup>

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61. See *infra* text accompanying notes 134-144.

62. See Comment, *The Right of an Illegal Alien to Maintain a Civil Action*, 63 CALIF. L. REV. 762 (1975). This Comment offers an extensive and thoughtful analysis of the issue. The author characterizes the "outlaw" concept of undocumented workers as follows:

To some, it might seem incredible that in the United States today there could still exist "outlaws" in the traditional common law sense of the word: persons who, although abused in every conceivable way, would be denied the protection of law in court . . . However, many people do find this credible indeed. For there exists a common misconception that persons who violate the guidelines established by the Immigration and Nationality Act for entry into or stay in the United States can and should be deprived of the right to bring a civil action in court.

*Id.* at 762.

Critics of NLRA coverage for undocumented workers premise their opposition on this "outlaw" notion. They assert that "illegal" workers cannot be presumed to have legal rights under the NLRA. This is especially true in the labor area because immigration law is violated directly by the desire to obtain employment. Consequently, it is argued that the NLRA cannot shroud persons with protection at the workplace when their very presence in the country contravenes United States immigration policy.

The inclusion of undocumented workers under the mantle of the NLRA could ensnarl federal immigration and labor law in a tangled *antinomy*. Since Congress cannot be presumed to have contemplated such a result,<sup>63</sup> the text, legislative history, and animating principles of the NLRA must be carefully scrutinized before a determination of coverage can be rendered. Assuming that federal *labor* law accords these workers employee status, federal *immigration* law must also be surveyed to determine whether it independently precludes such a legal conclusion. If this is the case, we are presented with the complex task of determining which body of federal law should take priority.

The NLRA definition of employee in section 2(3)<sup>64</sup> does not on its face exclude or include undocumented workers. The definition includes "any employee," and undocumented workers are absent from the list of persons excluded by the NLRA. The NLRB's decisions interpreting this provision, however, clearly instruct that it covers "all employees in the conventional as well as the legal sense."<sup>65</sup>

NLRB opinions have consistently held that undocumented workers *are* employees within the meaning of the NLRA. The legal cornerstone for the policy decision to include undocumented workers under

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63. Since both the NLRA and portions of the INA are explicitly concerned with the protection of labor, presumably these provisions should be read in *pari materia* unless a clear antinomy is indicated by the appropriate statutory construction. See generally 82 C.J.S. *Statutes* §§ 365-366 (1953) (discusses the appropriate canons of legal construction in instances of this nature).

64. 29 U.S.C. § 152(3) (1976) reads:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . as amended from time to time, or by any other person who is not an employee as herein defined.

65. E.g. *Seattle Post-Intelligencer*, 9 N.L.R.B. 1262, 1274 (1938) (held that certain "motor route drivers" were employees within the meaning of section 2(3) of the Act).



the NLRA is *Logan and Paxton*.<sup>66</sup> In this case the Board first articulated its judgment that the purposes of the NLRA brooked no alienage distinction in its coverage. The decision not to differentiate between citizens and non-citizens, however, appears to be dicta pro-pounded in the conclusory footnote. The footnote reads:

While no direct issue was made at the hearings as to the inclusion in the units of non-citizen employees and their eligibility to participate in the elections, it is evident from the record that such an issue may arise at the time of the elections. The Act does not differentiate between citizens and non-citizens. In order to effectively carry out the purposes of the Act, we conclude that no distinction should be drawn on such a basis. . . . Non-citizenship of an employee shall not, consequently, constitute a disqualification for participation in the elections.<sup>67</sup>

Although the Board offered no rationale for its determination of inclusion, the footnote indicates that the reason for its decision is to effectuate the policy of the NLRA.<sup>68</sup>

The Board has recognized the "employee" status of aliens even against union challenge.<sup>69</sup> Additionally, the Board was confronted with cases in 1949<sup>70</sup> and 1953<sup>71</sup> that in part dealt with the right of

66. 55 N.L.R.B. 310 (1944).

67. *Id.* at 315 n.12.

68. Exclusion of undocumented workers has repercussions not only for them but for domestic workers as well. If undocumented workers are deemed unprotected, then the NLRA's policy objective of promoting collective bargaining agreements is circumvented; it is unlikely that undocumented workers would initiate organizing activities, and even if they did initiate such efforts, strikes and other job actions are not likely to result in collective bargaining agreements. Additionally, the ability of domestic workers to obtain collective bargaining agreements is also jeopardized. Enterprises often employ undocumented persons in positions that require they work side-by-side or in complementary jobs with domestic workers. Consequently, native workers may not be able to unionize because even an effective strike can be easily weathered by an employer relying on the unprotected class of workers. As one commentator has asserted:

Lower wage rates and worse work conditions could be imposed on the unprotected workers, thus driving down the potential for higher wages for the protected workers. And the ability of the protected workers to exert economic pressure on the employer would be undercut by the presence of the unprotected class. It would simply be very impractical and contrary to the purposes of the [NLRA] for two groups of workers to do substantially the same work and yet have only one set protected by the collective bargaining agreement.

R. Romero, *Undocumented Aliens and the National Labor Relations Act* 5 (1979) (unpublished senior research paper, Northwestern Law School).

69. *Azusa Citrus Ass'n*, 65 N.L.R.B. 1136 (1946) (Mexican National permitted to participate in board election against union's contention to the contrary); *Allen and Sandilands Packing Co.*, 59 N.L.R.B. 724 (1944) (Union's argument for the exclusion of Mexican Nationals was rejected because non-citizenship is neither a ground for exclusion from a bargaining unit nor a disqualification for participation in elections conducted by the board).

70. *Cities Service Oil Co.*, 87 N.L.R.B. 324, 331 (1949) (citing *Azusa Citrus Ass'n*, 65 N.L.R.B. 1136 (1946) and *Logan and Paxton*, 55 N.L.R.B. 310 (1944), the

aliens to vote in union elections. In both cases the Board decided the question summarily, noting that the aliens' right to vote was too well established to warrant justification. It was not until the early seventies, however, that the Board was directly faced with issues relating to the coverage of *undocumented aliens* under the NLRA.

In *Lawrence Rigging, Inc.*,<sup>72</sup> the administrative law judge did not believe that the authorization card of an alien lacking "working papers" was valid because he was not an "employee" under the NLRA. The Board found nothing in the Act to support that position and reiterated its policy of giving aliens the right to vote in union elections. It expressly held that undocumented aliens' authorization cards are to be tabulated in determining whether the union represented a majority of union employees. This determination did not elaborate on the extra-legal status of the aliens involved, and the NLRB left untouched the anemic rationale supporting its prior decisions.

The decision in *Handling Equipment Corp.*<sup>73</sup> cast some doubt on the continued application of Board policy. In *Handling* a representational election resulted in a union victory, with the union receiving sixteen votes in a unit of twenty-eight. The same evening the employer conducted an immigration check. The employer asked to see "green cards"<sup>74</sup> and the twelve workers who could not produce them were dismissed, although seven later did produce their cards and were reinstated. The Board held that because there were sixteen pro-union votes cast the employer could not reasonably suspect that the twelve had cast those votes. Furthermore, the employer's "conduct indicates that [the employer] was concerned with their alien status rather than with the nature of their vote . . . ."<sup>75</sup> The reason for the employer's sudden urge to conduct an immigration raid was left unexplored, and the notion that the employer already knew the im-

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NLRB held that the "eligibility of aliens to cast ballots in board elections is too well established to warrant justification anew here").

71. Siedmon, Siedmon, Henkin, and Siedmon, 102 N.L.R.B. 1492, 1493 (1953) (citing Cities Service Oil Co., 87 N.L.R.B. 324 (1949), the court held that "the eligibility of aliens to vote in Board elections is well established").

72. 202 N.L.R.B. 1094 (1973).

73. 209 N.L.R.B. 64 (1974).

74. The term "green card" or "Mica" is the vernacular designation for the alien registration receipt card (I-151). This card serves as documentation of the fact that an alien can legally reside in the United States as a permanent resident. It is important to note, however, that an alien can be legally in the United States without such a card.

75. *Handling Equipment Corp.*, 209 N.L.R.B. at 65. The administrative law judge found it "difficult to understand how [the employer] could expect the employees to equate the lack of a green card with voting for the union." *Id.* It seems likely, however, that workers who are questioned about their immigration status only hours after a representation election won by the union, would interpret such action as retribution for their union support.

migration status of his employees was not even entertained.<sup>76</sup>

The two latest Board decisions reaffirm prior policy and acknowledge the reality of employer-undocumented worker relations. In *Amay's Bakery & Noodle Co.*,<sup>77</sup> the employer learned that a unionization campaign was in progress, so he demanded that workers lacking green cards not return to work. The Board explicitly held that undocumented workers are covered by the NLRA and that the employer's actions constituted a section 8(a)(3) violation.<sup>78</sup> It also held that the immigration interrogation and subsequent firing was impermissible discrimination, and not an exercise in good citizenship.

The Board decision in *Sure-Tan, Inc.*,<sup>79</sup> represents an unequivocal confirmation of its policy to include undocumented workers under the NLRA's definition of employee. Moreover, the Seventh Circuit's decision<sup>80</sup> in this case is the first time Board policy has received an imprimatur of support at the circuit court of appeals level. This decision, and the decision in *Apollo Tire*,<sup>81</sup> merit careful examination in an attempt to identify the reasoning and justification for such a policy.

In *Sure-Tan* a representational election conducted in December of 1976 resulted in the union<sup>82</sup> receiving six of the seven votes cast. The employer objected to the results of the election primarily because six of the seven eligible voters were "illegal aliens."<sup>83</sup> The Regional Director of the NLRB found the employer's objections to be without

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76. See M. BARRERA, *supra* note 16, at 123-124. In his analysis of Mexican immigration, the author discerned a prevailing misconception with serious social consequences. Barrera states:

It is important to dispel what I see as one of the key misconceptions surrounding this subject, which can be referred to as "the myth of employer naivete." According to this assumption, employers are largely unaware of the documented or undocumented status of their workers and do not have preferences one way or the other. On the contrary, there is a wealth of direct and indirect evidence that employers are well aware of their workers' status, and that many have a strong preference for the undocumented worker.

*Id.*

77. 227 N.L.R.B. 214 (1976).

78. *Id.*

79. 231 N.L.R.B. 138 (1977) (employee turnover in the certified unit as a result of deportation of illegal alien employees is irrelevant to issue of union's majority status).

80. *NLRB v. Sure-Tan, Inc.* 583 F.2d 355 (7th Cir. 1978) (alien workers are employees under the NLRA).

81. *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979) (undocumented aliens are employees under the NLRA).

82. Chicago Leather Workers' Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, now merged with the Retail Clerks' International to form the United Food and Commercial Workers' International Union.

83. 583 F.2d at 357.

merit and specifically decided that the undocumented workers were employees entitled to vote.

The employer responded to the union's certification by refusing to negotiate, which in turn prompted the filing of an unfair labor practice charge by the union. The company filed an answer to the unfair labor charge noting that the workers had been deported. The Board issued a bargaining order compelling the employer to enter into good faith negotiations with the union. At this juncture the employer took an appeal of right<sup>84</sup> to the United States Court of Appeals for the Seventh Circuit.

The *Sure-Tan* court's analysis of the status of undocumented workers under the NLRA resonates with immigration law implications; however, it is important to understand the labor law aspects of this decision. The court determined that the definition of "employee" was of broad scope. It took notice of certain "contrary hints" in the legislative history of the Act,<sup>85</sup> but concluded that they were inapposite and upheld the "longstanding and consistent"<sup>86</sup> policy of the Board on this question.

The majority's decision regarding the coverage of undocumented workers was grounded on the foreseeable adverse consequences to the labor-employer equation. The union had not violated the law, so decertification would visit a penalty on an innocent entity.<sup>87</sup> Furthermore, businesses would be tempted to hire undocumented workers because any union these workers formed could be decertified by the employer simply by revealing the illegal status of the workers. This fact, combined with the statutory election bar,<sup>88</sup> could result in the employer having consecutive periods of union-free life. Consequently, decertification would grant a benefit to the party that facilitates the circumvention of immigration law (i.e., the employer), and the benefit could potentially serve as a long-term shield against unionization by encouraging the repeated transgression of immigration policy. The court concluded that the scale attempting to approximate equal-

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84. 29 U.S.C. § 160(f) (1976). Section 160(f) reads:

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . .

85. 583 F.2d at 358-359.

86. *Id.* at 359. The court, citing *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals*, 523 F.2d 25, 36 (7th Cir. 1975), relied on the principle that although administrative interpretations are not controlling, nevertheless, the decisions of an administrator charged with the enforcement of the statute are entitled to deference unless there are compelling indications that they are wrong.

87. 583 F.2d at 360 ("here the lasting benefit goes not to the law violators - the aliens - but rather to the Union, which is not accused of wrongdoing").

88. 29 U.S.C. § 159(c)(3) (1976). This section provides that "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held."

ity of bargaining power at the workplace is unfairly tipped toward management by excluding undocumented workers from labor law protection.

The Ninth Circuit was also confronted with the issue of whether undocumented workers were "employees" within the meaning of the NLRA. In *Apollo Tire* several employees complained about the company's failure to pay overtime wages owed them,<sup>89</sup> and seven employees later lodged complaints with the Wage and Hour Division of the Department of Labor.<sup>90</sup> Management laid off six of the seven complaining workers within four days, citing decrease in sales and corresponding buildup of inventory as the reason for dismissal.<sup>91</sup> In administrative hearings investigating unfair labor practice charges, an additional reason for the lay-off was revealed: the employees had complained to the "Labor Commission."<sup>92</sup> Following the company's refusal to recall the discharged employees, the NLRB held the employer in violation of section 8(a)(1) and (4) of the NLRA.<sup>93</sup> The Board ordered the reinstatement of the six dismissed employees as partial remedy for the violation.<sup>94</sup>

In assaying the company's contention that Congress intended to exclude workers without proper work authorization from NLRA coverage, the court noted that section 2(3) defines "employee" broadly and undocumented workers are not specifically excluded from protection.<sup>95</sup> Given the Board's consistent interpretation of the definition, the court deferred to the NLRB's understanding of the statute since it was not clearly in error.<sup>96</sup>

### Immigration Law Analysis

In *Sure-Tan* the employer argued that the Board policy of allowing undocumented workers to vote in representation elections was untenable because it contradicted federal immigration law and policy. Although they reached contrary conclusions, both the majority and the dissent determined that the policies of the NLRA and the Immigration and Nationality Act were *not* inconsistent.

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89. 604 F.2d 1180, 1181 (9th Cir. 1979).

90. *Id.*

91. *Id.* at 1182.

92. *Id.*

93. 29 U.S.C. § 158(a)(1), (4) (1976).

94. 604 F.2d at 1182.

95. *Id.*

96. For a discussion of the judicial deference accorded to administrative interpretations in this context see *supra* note 86.

The company argued that section 212(a)(14)<sup>97</sup> of the INA prohibits the employment of undocumented workers; consequently, to hold that they are employees under the NLRA would directly contradict federal immigration law. A cursory reading of section 212(a)(14) readily discloses that it is applicable to aliens seeking to enter<sup>98</sup> the United States by requiring labor certification before a visa can be issued. This section establishes entrance requirements for certain types of aliens; it does not apply to the employment of aliens once inside the United States. In fact, no immigration statute prohibits an undocumented worker from working in the United States.<sup>99</sup>

Not only is the INA barren of any provision prohibiting undocumented persons from working, it also lacks any provision preventing employers from hiring them.<sup>100</sup> The argument that section 212(a)(14)<sup>101</sup> makes such provisions superfluous and redundant is spurious. First, section 212(a)(14) has never been construed to prohibit undocumented persons from working or employers from hiring them.<sup>102</sup> Second, since at least 1951, periodic efforts have been made to make the employment of undocumented workers unlawful; all have met with rejection at the federal level.<sup>103</sup>

A review of United States immigration law demonstrates an absence of direct conflict between it and Board and judicial rulings interpreting the INA on this question. An evaluation of the policy underpinnings of these laws, however, does suggest a potential clash of legislative purposes. The general goals of the NLRA are to promote

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97. 8 U.S.C. § 1182(a)(14) (1982). This section states, in relevant part: [T]he following classes of aliens . . . shall be excluded from admission into the United States:

(a)(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified . . . and available . . . to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed . . .

98. For a discussion of the legal importance of "entry" in this context see Comment, *The Legal Status of Undocumented Aliens: In Search of a Consistent Theory*, 16 HOUS. L. REV. 667, 702-709 (1979).

99. NLRB v. Sure-Tan, 583 F.2d 355, 359 (7th Cir. 1978); see also NLRB v. Apollo Tire Co., 604 F.2d 1180, 1183 (9th Cir. 1979).

100. Although "harboring" an undocumented person is in violation of the INA, a proviso to section 1324(a) removes employment from the definition of harboring. See 8 U.S.C. § 1324(a) (1982). This so-called "Texas Proviso" was enacted at the vehement insistence of Southwestern agribusiness which relies heavily on undocumented labor.

101. 8 U.S.C. § 1182(a)(14) (1982).

102. See Annot., 41 A.L.R. FED. 608 (1979). A review of cases interpreting section 212(a)(14) of the INA fails to disclose support for the proposition that it prohibits the employment of undocumented workers once inside the United States.

103. See *Centro de Inmigracion*, Laws Prohibiting the Employment of Undocumented Workers, (1977) (unpublished paper, Georgetown Law Center).

industrial peace through balanced collective bargaining power between employers and employees' representatives.<sup>104</sup> The intentment of section 212(a)(14) is, in part, the protection of American labor from unwanted foreign competition.<sup>105</sup> Inquiry into this question, therefore, must proceed to an investigation of these respective policies as perceived by the majority and dissent in *Sure-Tan* and *Apollo Tire*.

The *Sure-Tan* dissent methodically set forth the reasons for taking a contrary view on the issue of NLRA coverage of undocumented employees. It commenced by citing section 212(a)(14) of the INA from which it deduced "a presumption that aliens should not be permitted to enter this country to perform labor."<sup>106</sup> The opinion then noted that the Board is not at liberty to determine which related laws it may ignore. Moreover, the fact that the Board must consider immigration matters does not place the enforcement of immigration statutes upon it. The dissent, unfortunately, does not intimate where enforcement would lie. It summarily dealt with the right of undocumented workers to employee status by stating that "[t]he six [undocumented workers] had no right to be here, no right to the jobs, and consequently no right to make determinations binding on the respondents' business . . . ."<sup>107</sup> That the employer had previous knowledge of the workers' immigration status was of no moment because Congress had imposed no liabilities on the hiring of undocumented workers. Concluding its opinion, the dissent deemed speculative the argument that requiring the Board to give consideration to immigration law would result in increased hiring of undocumented workers to defeat unionization and, in any event, unions would support immigration enforcement to protect their members.

The majority in *Sure-Tan* initiated its discussion by referring to the broad statutory definition of employee and the "longstanding and consistent interpretation"<sup>108</sup> of the Board designating undocumented workers as employees under the NLRA. It observed that the INA is barren of any direct interdiction of employers hiring undocumented

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104. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (union is essential to give laborers opportunity to deal with employer on a basis of equality).

105. *See Saxbe v. Bustos*, 419 U.S. 65 (1974); *see also* Annot., *supra* note 102, at 617-618.

106. 583 F.2d at 361-362 (Wood, H., dissenting). For an analysis of the applicability of this presumption to the employment of undocumented workers *see infra* text accompanying notes 158-161.

107. 583 F.2d at 362 (Wood, H., dissenting).

108. 583 F.2d at 359. *See supra* note 86 for a discussion of judicial deference toward administrative decisions.

workers or these workers finding employment; consequently, no direct antinomy existed between federal labor and immigration law. The "outlaw" concept of the rights of undocumented persons was explicitly rejected.<sup>109</sup> The majority recognized that these persons are endowed with certain constitutional rights<sup>110</sup> and, as such, merely citing their illegal status cannot substitute for a substantive immigration law analysis.

In assessing the policy concerns of immigration law on this question, the majority held that "in the long run, declining to certify this union could only have the effect of *encouraging violations of immigration laws*."<sup>111</sup> It drew attention to the crucial fact that the employer, not the union, determines the status of the employees. Hence, refusing to certify a union with a majority of undocumented workers "would be giving employers an *extra* incentive to hire aliens and thus would be defeating the goals of the immigration law."<sup>112</sup>

The *Sure-Tan* court then illustrated the latter proposition using the facts of the case before it. The Regional Director's supplemental decision noted that the president of Sure-Tan, Inc. admitted knowing the illegal status of his workers several months before the election was held. The court then stated an "obvious possibility" is that the company hired undocumented workers knowing that if the aliens successfully unionized they could be reported to the INS and deported.<sup>113</sup> The opinion continued, "[I]n view of this prior knowledge (and prior disregard of its alleged duty under the immigration laws), it ill becomes the Company to argue after losing the election that certification would conflict with the immigration laws."<sup>114</sup> The majority then concluded by elaborating on the dissent's contention that it was imposing a "liability" by certifying the union. Certainly, the employer's prior disregard of immigration policy (by hiring undocumented workers) does not give rise to any liability, but neither does it absolve it of the obligation (like every other covered employer) to comply with federal labor law. The certification of a duly elected union is not a penalty but merely a vindication of labor law.

The dissent's assertion that unions can be relied on to prevent the

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109. The opinion noted that "to the extent that the immigration laws rather than the labor laws are relevant, the analysis cannot stop after noting the aliens' status but must determine how the policies underlying the immigration laws are best advanced under the circumstances." 583 F.2d at 359. See Comment, *supra* note 62, at 762.

110. The court observed that "despite the fact that their presence is unlawful, [undocumented workers] have some constitutional rights . . ." 583 F.2d at 359. For an excellent discussion of the constitutional rights of undocumented persons see generally Comment, *supra* note 98, at 677-702.

111. 583 F.2d at 360 (emphasis added).

112. *Id.* (emphasis added).

113. *Id.* The court astutely pierced the "myth of employer naivete" discussed *supra* note 76.

114. 583 F.2d at 360.



increased hiring of undocumented workers by employers seeking to avoid unionization requires a brief comment. Given the debilitated state of the United States trade union movement, this may be an unwarranted expectation; nevertheless, even assuming a viable union movement, it does not follow that INS policy will be more responsive to labor than to management. Established unions will no doubt protect their members; however, undocumented workers are primarily employed in unorganized sectors, and it is precisely the initial extension of union protection to these workers that is impeded by the dissent's position. A union cannot protect workers it cannot organize.

The *Apollo Tire* court, incorporating a *Sure-Tan* analysis, also rejected the assertion that Board policy contravened the letter or spirit of the INA.<sup>115</sup> Instead, the coverage of undocumented workers under the NLRA furthers the policies underlying the INA.<sup>116</sup> The opinion in relevant part reads:

Were we to hold the NLRA inapplicable to [undocumented workers], employers would be encouraged to hire such persons in hopes of circumventing the labor laws. The result would be more work for [undocumented workers] and violations of the immigration laws would be encouraged.<sup>117</sup>

The opinion raises a further concern about the Board's competence to delve into immigration questions, which the court felt were out of the NLRB's field of expertise and, as such, were matters properly before the INS.<sup>118</sup> This discussion ended with the court noting that an employer could report an undocumented worker to the INS, but the "employer is not permitted to commit unfair labor practices in the knowledge that the Board is powerless to remedy them."<sup>119</sup>

In reviewing the immigration law arguments against the coverage of undocumented workers under the NLRA, the circuit courts have not only rejected the notion of an antinomy but also have held that coverage promotes the interests embodied in the INA. Although this conclusion appears well-supported in law and policy, critics forcefully point to the fact that the initial premise of consonance between the two bodies of law may be incorrect. These persons advance the compelling argument that protecting undocumented workers under the NLRA subverts the "safeguards" to United States labor encased

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115. *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979).

116. *Id.*

117. *Id.*

118. *Id.* The *Sure-Tan* court also held that immigration questions "should be left to immigration officials rather than to the Board . . ." 583 F.2d at 359.

119. 604 F.2d at 1183.

in various INA provisions.<sup>120</sup> This objection to the coverage of undocumented workers under the NLRA merits a closer analysis.

### *Incongruous Policies*

The *Sure-Tan* and *Apollo Tire* rationale for including undocumented workers under the mantle of the NLRA is based on the finding of an absence of conflict between federal labor and immigration law. Critics argue, however, that a fundamental incompatibility exists between the policies of the INA, which manifests a strong concern for "safeguarding" domestic labor, and the current NLRB policy of protecting foreign workers.<sup>121</sup> The persistence with which this contention is made, and its plausible support in immigration law and doctrine, calls for a detailed examination of its postulates.

#### Safeguarding American Labor and Section 212(a)(14): History and Statutory Interpretations

The question considered is not whether the regulation and control of immigration is an important national goal. It clearly is. Nor is the question whether Congress could prohibit the undocumented alien from obtaining employment or the employer from hiring such a person. It clearly could. Rather, the issue addressed is whether the provisions and concerns of the INA should be construed so as to bring it in conflict with the NLRB's policy of according employee status to undocumented workers.

An historical assessment of United States immigration policy, the critics contend, discloses a steadfast and forceful congressional concern with the economic well-being of United States workers. The Alien Contract Labor Acts<sup>122</sup> evidence early efforts to deal with the influx of immigrant workers and their inexorable tendency to "degrade American labor and to reduce it to the level of imported pauper labor."<sup>123</sup> The 1917 Literacy Act<sup>124</sup> and the quantitative restrictions of the National Quota Laws<sup>125</sup> reflect subsequent congressional

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120. See *infra* text accompanying footnotes 121-144.

121. See Note, *The Alienation of American Labor: The National Labor Relations Act and the Regulation of Illegal Aliens*, 13 N.Y.U. J. INT'L L. & POL. 961, 987-91 (1981).

122. Act of February 26, 1885, ch. 164, 23 Stat. 332; Act of February 23, 1887, ch. 220, 24 Stat. 414. The Knights of Labor, the first mass organization of United States workers, lobbied vigorously for the passage of a contract labor law to prevent the use of immigrant workers as strikebreakers. See Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROBS. 213, 218 (1956).

123. 16 CONG. REC. 5359 (1885) (quoted in Note, *supra* note 121, at 975).

124. Act of February 5, 1917, ch. 29, 39 Stat. 874. The enactment of this act, over a second veto by President Wilson, represents the culmination of restrictionist efforts during the qualitative phase of immigration restriction.

125. Act of May 19, 1921, ch. 8, 42 Stat. 5; Act of May 26, 1924, ch. 190, 43 Stat. 153.

interest in protecting the native labor force. The 1965 amendments<sup>126</sup> to the INA illustrate contemporary legislative concern in promoting the interests of domestic workers. Prior to this enactment aliens seeking entry into this country were presumed to be admissible under section 212(a)(14) of the INA absent a contrary finding by the Secretary of Labor. The 1965 amendments reversed this presumption; an alien was deemed excludable unless the Secretary of Labor made an affirmative finding of need pursuant to section 212(a)(14).<sup>127</sup> Moreover, the 1976 amendments<sup>128</sup> mandated the application of section 212(a)(14) to Western Hemisphere immigrants based in part on congressional desire "to protect the domestic labor force."<sup>129</sup> This historical solicitude for United States labor, the argument goes, was ultimately embodied in section 212(a)(14) of the Immigration and Nationality Act of 1952.<sup>130</sup>

Proponents of the "antinomy" argument<sup>131</sup> interpret the historical purpose of section 212(a)(14) and its subsequent judicial gloss as creating "a presumption that aliens seeking employment are illegally present in the United States unless certified by the Secretary of Labor."<sup>132</sup> Moreover, this presumption "operates against the admission of the alien in order to protect American workers from the likely detrimental effects of unrestricted immigrant labor."<sup>133</sup> Accordingly, the argument is advanced that section 212(a)(14), and the policy upon which it is based, prohibits the employment of undocumented workers within the United States. The failure of the *Sure-Tan* and *Apollo Tire* courts to recognize this interdiction is put forth as a serious analytical error calling for a reconsideration of their holdings.

126. Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

127. See generally *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975); Annot., *supra* note 102, at § 5.

128. Pub. L. No. 94-571, 90 Stat. 2703 (1976) (codified as amended in scattered sections of 8 U.S.C.).

129. H.R. REP. NO. 94-1553, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6073, 6076.

130. Pub. L. No. 82-414, § 212(a)(14), 66 Stat. 163, 183 (codified as amended at 8 U.S.C. § 1182(a)(14) (1982)).

131. The argument that advances the notion that the NLRA and INA are in fundamental conflict is described in this article as the "antinomy" argument. The word "antinomy" is defined as "a contradiction between two apparently equally valid principles or between inferences correctly drawn from such principles." WEBSTER'S NEW COLLEGIATE DICTIONARY 50 (1981).

132. Note, *supra* note 121, at 978.

133. *Id.* See also *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974).

While this argument brings to the fore pertinent and legitimate policy concerns, it nevertheless misinterprets the history and scope of section 212(a)(14), and it fails to adequately explain the conventional legal understanding of immigration law. Additionally, proponents of the antinomy argument fail to provide a persuasive reason why immigration law should have ascendancy over labor law at the workplace.

The exponents of the antinomy argument espouse an incomplete reading of United States immigration history. While it is true immigration law has evinced a concern for the interests of native workers, it is equally true United States immigration law and policy has demonstrated a persistent desire for obtaining foreign workers. Historical evidence strongly suggests the United States government and employers initiated and sustained the migration of Mexican workers.<sup>134</sup> The first bracero program of 1918,<sup>135</sup> involving an estimated 80,000 Mexican workers, was authorized by a questionable application of immigration laws.<sup>136</sup> The program, nevertheless, "served as a catalyst for augmented immigration."<sup>137</sup> The legal provisions created for the protection and benefit of the braceros<sup>138</sup> were flouted because the "basic weakness of the program was [the] lack of [an] adequate enforcement machinery."<sup>139</sup> More importantly, even after changing political conditions forced the termination of the legal bracero program:

The government continued to maintain an informal Mexican labor program by simply refusing to apply the immigration laws vigorously and systemati-

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134. For a comprehensive historical analysis of the role of United States employers in initiating and sustaining the migration of immigrants to this country see Lopez, *supra* note 10, at 641-672; M. PIRE, *BIRDS OF PASSAGE* 19-26 (1979).

135. See SENATE COMM. ON THE JUDICIARY, CONGRESSIONAL RESEARCH SERVICE, *TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES*, 96th Cong., 2d Sess. 6-15 (Comm. Print 1980).

136. *Id.* at 8. The report observed:

Secretary of Labor Wilson had not consulted with Congress prior to his issuance of the departmental order admitting temporary alien workers under a suspension of certain provisions of the 1917 act. Congressman John Burnett of Alabama, the chairman of the House Committee on Immigration and Naturalization, informed him that he possessed no such power of suspension, and introduced legislation to repeal the ninth proviso. In a subsequent protest he wrote:

"I do not believe that there is a soul outside your Department that thinks such a construction should be given this Section [of the 1917 Act]."

(citation omitted).

137. M. REISLER, *supra* note 12, at 42.

138. "Bracero" is the appellative used in common parlance since 1942 to refer to Mexican nationals who work in the United States under the contract labor programs of 1917 and 1942. The word "bracero," literally translated, means one who works with his arms. The closest English equivalent is "fieldhand." See Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 68 n.15 (1975).

139. Scruggs, *The First Mexican Farm Labor Program*, 2 ARIZ. & THE WEST 322, 324 (1960).

cally. Far from reducing the number of Mexican workers, the end of the emergency program marked the beginning of a decade which brought Mexican workers to the United States in vastly increased and unprecedented numbers.<sup>140</sup>

Thus, the United States government continued its procurement of Mexican labor by extra-legal means.

The economic dislocations of the Great Depression eliminated the need for Mexican labor, and migration from that country was almost nil throughout the 1930's. In the early 1940's Mexican immigration was regenerated by the United States government because of its concern with labor conditions in the advent of World War II. The second bracero program, although justified as a war-caused emergency, lasted twenty-two years and involved between four and five million Mexican agricultural workers.<sup>141</sup> The United States government also countenanced the creation of a reserve of undocumented labor of similar numbers to complement its bracero labor pool.<sup>142</sup> Such practices as "legalizing"<sup>143</sup> undocumented workers and unilaterally opening the border<sup>144</sup> further documented federal government compliance

140. Kiser, *Mexican American Labor Before World War II*, 2 J. MEX. AM. HIST. 128, 136 (1972).

141. See J. SAMORA, *LOS MOJADOS: THE WETBACK STORY* 57 (1971).

142. *Id.* The author notes the simultaneous existence of a large bracero and undocumented worker pool and interprets it as follows:

Although these figures as reported by the Immigration Service are questionable perhaps in many cases unreliable, nevertheless they indicate the magnitude of the problem and when considered in broader terms, suggest the evolution of an immigration policy that may best be understood as an extensive farm labor program—an efficient policy representing a consistent desire for Mexicans as laborers rather than as settlers. This policy stands out as a legitimized and profitable means of acquiring needed labor without incurring the price that characterized the immigration, utilization, and the eventual settlement of European and Oriental immigrants.

143. PRESIDENT'S COMM'N ON MIGRATORY LABOR, *MIGRATORY LABOR IN AMERICAN AGRICULTURE* 53 (1951). The Commission described the "legalizing" of undocumented workers as follows:

A technique more insidious than ingenious was devised and put in effect by the agencies of the United States Government having responsibility for law enforcement and procurement of labor. In this improvisation, the Immigration and Naturalization Service would be allowed to "deport" the [undocumented worker] by having him brought to the border at which point the [undocumented worker] would be given an identification slip. Momentarily, he would step across the boundary line. Having thus been subjected to the magic of token deportation, the [undocumented worker] was now merely alien and was eligible to step back across the boundary to be legally contracted.

144. United States government officials "opened" the border for the expressed purpose of unilaterally recruiting Mexican workers on two occasions during the bracero program. In 1948 the border was opened in El Paso, Texas, in response to Mexican government demands for an increase in the wage rate, and in 1954, in California, unilateral recruitment was initiated in an attempt to force Mexico to accept a new international

with the procurement of temporary labor whether it be of the "bracero" or "illegal" variety. Consequently, United States immigration policy cannot be simplistically characterized as intended to "safeguard" domestic labor.

As noted, advocates of the antinomy argument interpret section 212(a)(14) of the INA as creating a presumption that alien employment within the United States is illegal absent compliance with that provision.<sup>145</sup> Based on this immigration law analysis, they contend section 212(a)(14) serves as an independent federal statute foreclosing coverage of these workers under the NLRA. As will be seen, this analysis of immigration law is theoretically muddled, inattentive to the expressed terms of the statute, and elaborates a one-sided view of the policy concerns embodied in this section.

The essential flaw in the antinomy argument is the confusion over the legal rationale in forming the *exclusion* section of the INA and the legal rights or disabilities applied to the aliens who are deemed to have "entered" the United States. Long ago the Supreme Court acknowledged congressional supremacy in exercising its inherent sovereign power to exclude foreigners.<sup>146</sup> Congress has virtually unbridled discretion in the exclusion of those still at our door. For example, the Court has held "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien *denied entry* is concerned."<sup>147</sup>

Juxtaposed to the judicial deference paid to congressional exclusionary enactments, the Court has held that an alien who effectuates an "entry" into the territorial jurisdiction of the United States is vested with constitutional rights and entitled to due process before being expelled.<sup>148</sup> Moreover, the illegal status of the alien is not a factor in ascertaining the existence of entry, nor does it preclude the extension of constitutional or statutory rights. The Court in *Leng May Ma v. Barber* forthrightly recognized this legal proposition:

[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, . . . and those who are in

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accord on braceros. See R. GARCIA, OPERATION WETBACK 74-76, 83-86 (1980).

145. See generally Note, *supra* note 121, at 976-978.

146. See U.S. CONST. art. I, § 8. The relevant language of the article provides "Congress shall have Power to . . . regulate Commerce with foreign Nations and . . . to establish a uniform Rule of Naturalization." The House committee in its report on the INA asserted: "The Power of Congress to control immigration stems from the constitutional power of Congress to regulate commerce with foreign nations." H.R. REP. NO. 1365, 82d Cong., 2d Sess. 1, reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1653, 1653-54.

147. *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (emphasis added).

148. *The Japanese Immigrant Case*, 189 U.S. 86 (1903) (alien who has entered the country, although alleged to be illegally here, must be given opportunity to be heard on his right to remain in the country).

the United States after an entry, irrespective of its legality.<sup>149</sup>

The Court noted that in the latter instance it "has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'"<sup>150</sup>

The exponents of the antinomy argument give inadequate consideration to the fact that section 212(a)(14) is undoubtedly an exclusion provision which is being applied to aliens who have already "entered." Implicit in the antinomy argument is the notion that the fictional entry doctrine — such as parole status where a person actually in the country is not legally deemed to have entered — should be extended to cover undocumented workers.<sup>151</sup> Indeed, the whole "outlaw" concept of not according rights for undocumented persons appears theoretically founded on the misconceived application of congressional exclusionary powers to persons who have entered, albeit illegally.

The fundamental theoretical problem with utilizing this fictional entry doctrine to give section 212(a)(14) the scope to prohibit the employment of undocumented persons for the purposes of a labor law analysis is that immigration law does not accept such an extension. Undocumented aliens have entered the country for immigration law purposes and, consequently, are subject to expulsion rather than exclusion proceedings.<sup>152</sup> The incidence of entry has substantive ramifications because the immigrants who have entered have been accorded rights both in deportation and nondeportation settings.<sup>153</sup>

149. 357 U.S. 185, 187 (1958).

150. *Id.* (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

151. See Comment, *supra* note 98, 705-707. The author argues the preponderant importance of "entry" emanates from the need to balance "the constitutional guarantee of due process to all 'persons' within its jurisdiction versus the constitutional commitment to Congress of foreign policy and the related admission of foreign nationals to the United States shore." As a result the Court has "abdicated entirely when Congress excludes an alien still at the threshold . . . and has justified the fictional entry doctrine as a device which allows Congress to be humane in emergencies (medical or political) and to release excludable aliens from custody without losing any flexibility in deciding whom to admit." *Id.* at 706.

152. *Id.* at 707. The commentator notes the application of the fictional entry doctrine for nonimmigrant purpose is ironic since this doctrine does *not* apply to undocumented persons for immigration-related questions.

153. See *Wong Wing v. United States*, 163 U.S. 228 (1896) (invalidated a statute which provided that Chinese persons, found to be illegally present in the country without a hearing, would be imprisoned at hard labor for up to one year prior to deportation). See also *The Japanese Immigrant case*, 189 U.S. 86, 101 (1903). For a recent analysis of the constitutional status and protection of undocumented persons in a nondeportation context viz-a-viz states see *Plyler v. Doe*, 457 U.S. 202 (1982).

In short, it is theoretically incorrect to give a provision a compass and substantive meaning for the purpose of analyzing an independent body of federal law which it does not command within its own statutory structure and doctrine.

The expressed terms of section 212(a)(14) reveal its intentment is to prohibit the issuance of a visa authorizing the legal admission of specific immigrants unless the Secretary of Labor has first certified to the Secretary of State and the Attorney General the lack of "sufficient" native workers and an absence of "adverse affect" on prevailing wages.<sup>154</sup> The text of this provision limits its application to prospective immigrants eligible for non-preference<sup>155</sup> status or seeking admission under the third<sup>156</sup> or sixth<sup>157</sup> preference categories. Hence, this provision is specifically aimed at visa determinations for a limited category of prospective immigrants. Neither its express terms nor its location within the INA statutory scheme suggest it was intended to reach the employment of undocumented workers within the United States.

Commentators and the dissent in *Sure-Tan*, however, cite *Pesikoff v. United States*<sup>158</sup> for the broad proposition that section 212(a)(14) gives rise to a presumption that any alien within the United States is prohibited from working unless certified pursuant to that provision.<sup>159</sup> An examination of *Pesikoff* fails to yield support for this broad presumption. *Pesikoff* dealt with an alien seeking admission under the sixth preference<sup>160</sup> who was denied entry pursuant to a Secretary of Labor finding under section 212(a)(14). The putative employer alleged an abuse of discretion because the Secretary lacked

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154. 8 U.S.C. § 1182(a)(14) (1982); see *supra* note 97.

155. 8 U.S.C. § 1153(a)(8) (1982). For a discussion of this provision see C. GORDON, E. GORDON, *IMMIGRATION AND NATIONALITY LAW* § 2.24n (student ed. 1979).

156. 8 U.S.C. § 1153(a)(3) (1982). This section reads:

Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a), to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States, and whose services in the professions, sciences, or arts are sought by an employer in the United States.

157. *Id.* at § 1153(a)(6). This section provides:

Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

158. 501 F.2d 757, *cert. denied* 419 U.S. 1038 (1974).

159. See Comment, *Illegal Aliens Are Employees Under 29 U.S.C. § 152(3) (1976) And May Vote In Union Certification Election*, *NLRB v. Sure-Tan, Inc.*, 538 F.2d 355 (7th Cir. 1978), 10 RUT.-CAM. L. REV. 747, 751 (1979); Note, *supra* note 121, 978.

160. 8 U.S.C. § 1153(a)(6) (1982); see *supra* note 157.



sufficient evidence to prove the availability of domestic workers. The court held that section 212(a)(14) was intended to set up a presumption that aliens should not be permitted *to enter* the United States for the purpose of performing labor. This presumption, noted the court, could be overcome only if the Secretary of Labor had determined the conditions set forth in the statute were met. Moreover, the structure of the statute strongly indicated the Secretary was not obligated to prove in the case of every alien seeking to perform labor that the conditions were not met. Rather, given the presumption of the statute against admission, if the Secretary's consultation of the general labor market data readily available reveals a pool of potential workers available to perform the job which the alien sought, the burden should be placed on the alien, or the putative employer, to prove it was not possible for the employer to find qualified American workers.

The "presumption" involved in this case related to which of the parties carried the burden of proving the existence *vel non* of sufficient domestic workers and an adverse effect on prevailing wages. The court required the Secretary of Labor to carry the burden of coming forward with minimal evidence, but the alien or the prospective employer must carry the ultimate burden of proving that insufficient domestic workers are available and the employment of this alien would not adversely affect the native workforce.<sup>161</sup> Certainly, neither the facts, holding, nor dicta indicate the presumption involved reached the employment of undocumented workers who have entered and are employed within the United States. The decision, moreover, does not articulate a justification for the application of exclusionary provisions to immigrants who have entered the country. Obviously, adherents of this argument attempt to do by presumption something Congress has never done by enactment—prohibit the employment of undocumented workers once they are in the country.

Advocates of the antinomy argument suggest that the contradictory nature of immigration and labor law manifests itself at the policy level. The strong concern for safeguarding American labor, the argument goes, should be made operative by an expansive reading of section 212(a)(14) of the INA.<sup>162</sup> Analysis of this contention, however, reveals several deficiencies: First, the express terms of section 212(a)(14) clearly show a blanket prohibition on the employment of aliens (irrespective of legal status) was never contemplated. Second,

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161. 501 F.2d at 761.

162. See generally Note, *supra* note 121, 976-980.

this section in particular and the INA in general have balanced the desire to protect native workers with the competing need to import workers for economic reasons.<sup>163</sup> Thus, the strong policy foundations of this provision do not automatically lead to the conclusion that all alien employment is illegal absent certification. Third, when Congress has *directly* considered the prohibition of the employment of undocumented workers, it has declined to impose any liability on employers hiring them;<sup>164</sup> in fact, it has even removed such employment from criminal sanction.<sup>165</sup> Consequently, if an employer is permitted to employ undocumented workers under the INA, it is difficult to see how section 212(a)(14) prohibits these workers from being employees under the NLRA. In summary, despite the strong policy concerns buttressing this provision, they cannot be used to alter so radically the concrete means devised by Congress to implement it.

The deficiency of the antinomy argument goes beyond the theoretically confused and inaccurate immigration law analysis; it also fails to justify why, even assuming an antinomy, immigration law should take precedence over labor law. This issue is considered next.

### NLRA and INA: Principles of Accommodation

At issue in the present discussion is not whether the NLRB must accommodate the procedure and policy of the INA,<sup>166</sup> but rather, whether such an accommodation must result in the exclusion of undocumented workers from the aegis of the NLRA, as adherents of the antinomy argument contend. In analyzing this question guidance is sought in an examination of the exact nature of the accommodation required of the Board.

As noted, the argument for the exclusion of undocumented workers consists of two steps. First, a dissonance between labor and immigration law must be established.<sup>167</sup> Second, the legal rationale explaining why the "accommodation" of the INA necessitates that the Board withhold all protection must be formulated. In order to fully analyze the accommodation rationale of the antinomy proponents,

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163. See *supra* text accompanying notes 134-144.

164. The Carter administration failed to gain congressional approval of a legislative proposal which included sanctions against the employers of undocumented workers. H.R. 9531, 95th Cong., 1st Sess. (1977); S. 2252, 95th Cong., 1st Sess. (1977). Legislation introduced in 1982 by Senator Simpson and Representative Mazzoli also contains so-called "employer sanctions" and met with a similar fate. Simpson/Mazzoli II, introduced in 1983, includes employer sanctions as well. However, this bill has also failed to become law, but it may again be considered in 1984. See *supra* note 5.

165. 8 U.S.C. § 1324(a) (1982). See *supra* note 100.

166. See *infra* text accompanying notes 171-188.

167. See *supra* text accompanying notes 97-120 for an analysis of whether the INA and the NLRA are in fundamental conflict on this question.

the first step of their argument will be assumed.

The critics' justification for precluding coverage of undocumented workers is gleaned from the principles of accommodation and the nature of the INA-NLRA conflict. Citing *Southern S.S. Co. v. NLRB*<sup>168</sup> for the proposition that the Board cannot pursue its administration of the NLRA "so single-mindedly" as to impede other federal law,<sup>169</sup> it is argued that the Seventh and Ninth Circuit Courts of Appeals were "myopic" in their consideration of immigration-related questions.<sup>170</sup> Noting that deportation or criminal sanctions can be imposed on persons violating immigration laws, they maintain the Board cannot extend statutory protection to such aliens. Hence, the gravamen of this argument appears to be that the extension of statutory protection of the NLRA to these persons will impede the administration of the INA to an unacceptable degree.

The accommodation rationale articulated by critics of *Sure-Tan* and *Apollo Tire* essentially misunderstands the measure of accommodation required of the Board in an area under its administrative domain, and suffers from an inadequate assessment of the extent of interference in immigration matters that may result from these decisions. In *Southern S.S. Co.* the Court indeed admonished the Board that it could not "wholly ignore other and equally important Congressional objectives."<sup>171</sup> Although the language of the Court is sweeping, the facts<sup>172</sup> and legal posture<sup>173</sup> of the case impose definite constraints on the scope of this injunction. A clarification of the exact nature of the accommodation required can be gleaned from the Supreme Court's decision in *Carpenters' Union v. NLRB*.<sup>174</sup> In this well-known case the Court dealt in part with an argument that cer-

168. 316 U.S. 31 (1942).

169. *Id.* at 47.

170. Note, *supra* note 121, at 988.

171. 316 U.S. at 47.

172. *Id.* at 38. The Court noted that "ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land." The nature of this venture requires undivided authority, and this was reinforced by a mutiny statute that unambiguously forbade the behavior engaged in by the sailors. Moreover, the withholding of labor in these circumstances is surcharged with the potential for violence. These unique factual concerns are absent in the usual case of undocumented worker employment.

173. In *Southern S.S. Co.* the conflict between the mutiny statute and the NLRA did not result in the *inapplicability* of the Labor Act. Rather, a specific remedy of the Act—reinstatement of employees—was deemed an abuse of discretion because it "worked directly to weaken the effectiveness of a statutory prohibition . . . ." Cited in *Carpenters' Union v. NLRB*, 357 U.S. 93, 111 (1958).

174. 357 U.S. 93 (1958).

tain “hot-cargo”<sup>175</sup> provisions in collective bargaining agreements were void *ab initio* because they violated the Interstate Commerce Act. Since “hot-cargo” agreements violated the Interstate Commerce Act, it seemed to follow that this same provision was void for labor law purposes. The Court cautioned, however, against having determinations under one statute “mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes.”<sup>176</sup> The opinion goes on to state:

The Board is not concerned with whether the carrier has performed its obligations to the shipper, but whether the union has performed its obligation not to induce employees in a manner proscribed by § 8(b)(4)(A).<sup>177</sup>

The Court then distinguished *Southern S.S. Co.* noting that a *specific remedy* of the Board worked to directly weaken the statutory prohibition against mutiny by crew-members of a vessel. The Court observed:

Presumed illegality under the Mutiny statute . . . was relied on to establish an abuse of discretion in giving a remedy. [There was not] any suggestion that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes.<sup>178</sup>

Consequently, the admonition in this case simply requires the Board to fashion remedies that do not directly contradict competing federal law. While it still can be argued that particular NLRB remedies may constitute an abuse of discretion based on immigration-related concerns,<sup>179</sup> there is no basis for arguing the Board must withhold *all* statutory protection from undocumented workers because of possible immigration interference. Principles of accommodation do not require an agency’s abdication of its legislative mandate.

The principle of accommodation appears to operate only after an agency has made an independent determination of the questions under its own statutes. Of course, “[c]ommon factors may emerge in the adjudication of these questions, but they are, nevertheless, distinct questions involving independent considerations.”<sup>180</sup> At the con-

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175. 29 U.S.C. § 158(e) (1976). This section reads, in relevant part, as follows: It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

See R. GORMAN, BASIC TEXT ON LABOR LAW 263-64 (1976).

176. 357 U.S. at 110.

177. *Id.* (§ 8(b)(4)(A) of the NLRA is codified as amended at 8 U.S.C. § 158(b)(4)(A) (1982)).

178. 357 U.S. at 111.

179. See *infra* text accompanying notes 218-235.

180. *Carpenters’ Union v. NLRB*, 357 U.S. 93, 110 (1958).

clusion of this analysis the agency must attempt to effectuate its determination in a manner that will not directly undermine the effectiveness of a collateral statute. The working of this general process can be gleaned from two recent Supreme Court decisions.

In *Emporium Capwell Co. v. Western Addition Community Organization*,<sup>181</sup> the Court indicated the accommodation the Board should make between the policies of Title VII<sup>182</sup> and the provisions of the NLRA relating to selection and certification of exclusive bargaining representatives. The Court held that minority employees had no right under the NLRA to circumvent established grievance procedures and separately picket their employer's store in furtherance of their demand that their employer remedy alleged discrimination against them. In upholding the employee's discharge, the Court found the picketing tended to induce the employer to bargain with someone other than the employees' exclusive representative.<sup>183</sup> Although national policy "embodies the principles of nondiscrimination as a matter of highest priority,"<sup>184</sup> the desire of the minority employees to negotiate directly with the employer could not undermine the NLRA policy favoring exclusive bargaining representation. The Board's legislatively mandated responsibility is the enforcement of labor policies encased in the NLRA.<sup>185</sup>

In *NAACP v. Federal Power Commission*,<sup>186</sup> the Court analyzed the statutory role of the Federal Power Commission (FPC) in the administration of equal employment opportunity laws. The NAACP petitioned the Commission to issue a rule requiring its regulatees to adopt nondiscriminatory employment practices and affirmative action plans, and permit the filing of discriminatory practices complaints with the FPC. The Commission refused to issue the rule. The Court agreed that the FPC's obligation of setting "just and reasonable rates" for the sale and transmission of electricity gave it power to entertain evidence that a regulatee has practiced discrimination in employment practices resulting in "illegal, duplicative, or unnecessary labor costs."<sup>187</sup> The Court, nevertheless, rejected the argument

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181. 420 U.S. 50 (1975).

182. 42 U.S.C. §§ 2000e - 2000e-16 (1976).

183. 420 U.S. at 57-58; see also *Emporium*, 192 N.L.R.B. 173, 173 n.2 (1971).

184. 420 U.S. at 66.

185. For an analysis of the statutory mandate of the NLRA in connection with racially motivated employment discrimination see Axelrod & Kaufman, *Mansion House-Bekins-Handy Andy: The National Labor Relations Board's Role in Racial Discrimination Cases*, 45 GEO. WASH. L. REV. 675, 682-688 (1977).

186. 425 U.S. 662 (1976).

187. *Id.* at 668.

that the Commission's statutory duty to act in the "public interest" required the FPC to oversee all aspects of the regulatee's labor relations. In ascertaining the accommodation to be accorded civil rights concerns, the agency must look to its enabling legislation.<sup>188</sup> The statutes or their legislative history must evince a congressional intent that the elimination of employment discrimination be a primary agency goal.

In this light, a more substantive evaluation of the accommodation to be accorded immigration matters by the NLRB can be offered. First, a worker's illegal status may constitute a violation of immigration law but that does not by itself prevent the NLRB from making a determination that the worker is an employee under the statutes and policies entrusted to it. The existence of common facts, moreover, does not diminish the agency's responsibility to make an independent analysis of the question. Second, even though the regulation of immigration may be of highest national priority, the Board must still interpret and enforce its statutes with regard to its established policy — a policy it has determined to be furthered by the inclusion of these workers. Third, the primary responsibility of the NLRB is to carry out its legislative mission, and the Board must look to its statute and legislative history to determine its role in immigration matters. An analysis of these areas fails to yield support for the notion that immigration regulation was a primary agency goal.

When the question at hand is analyzed under the principles of accommodation, no compelling legal justification exists for the non-coverage of undocumented workers. Even if section 212(a)(14) is understood to prohibit the employment of undocumented persons, that determination should not be mechanically carried over to a labor law analysis. Rather, the Board still has the obligation to determine whether its goal of promoting the free flow of commerce is furthered by their coverage under the NLRA. Furthermore, irrespective of the national concern with immigration, the Board must apply its own policy in determining such threshold questions as employee status. Finally, ever mindful of the need to minimize interference with immigration law, the Board must fulfill its legislative mandate; nothing in its statutes or legislative history makes the regulation of immigrant labor a primary agency concern. The NLRB's policy of conferring employee status to undocumented workers is well within the principles of accommodation, and *Southern S.S. Co.* is more apposite in determining the availability of certain Board remedies than in supporting the argument for the wholesale non-protection of these workers.

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188. *Id.* See Axelrod & Kaufman, *supra* note 185, at 687.

*Unfair Labor Practices: Sure-Tan II*

On February 24, 1982, the Seventh Circuit issued a decision in the case of *NLRB v. Sure-Tan, Inc.*,<sup>189</sup> (*Sure-Tan II*) which dealt with the "bogeymen" of unfair labor practices and appropriate remedies in situations involving undocumented workers. The opinion in *Sure-Tan II* offers an excellent opportunity to summarize the arguments presented in this work, and to briefly trace the court's reasoning in finding section 8(a)(1) and 8(a)(3) violations. More importantly, the set of three remedies proposed by the administrative law judge (ALJ), the Board, and the Seventh Circuit afford us an opportunity to explore the "knotty problem of rectifying the injustice done certain of these aliens."<sup>190</sup>

On February 22 and March 23, 1977, the Regional Director for Region 13 issued complaints against Sure-Tan, charging it with violations of sections 8(a)(1), 8(a)(3) and 8(a)(4) of the NLRA. The complaint alleged that Sure-Tan had discriminatorily discharged five employees because of their union activities; threatened, interrogated, and coerced its employees to discourage them from engaging in protected activities; and discriminatorily reprimanded an employee who filed a complaint with the Board.<sup>191</sup> The ALJ upheld the complaints in all respects, and the NLRB affirmed but modified the backpay and reinstatement remedy. The Seventh Circuit found that substantial evidence supported the Board's order; however, it too modified the remedy.

## Section 8(a)(1) and Undocumented Workers

The ALJ found numerous occasions when John Surak, part owner of Sure-Tan, Inc., threatened, coerced, and interrogated various employees about their union support. On at least two occasions Surak approached employees with a piece of paper with squares marked "yes" and "no." Surak pointed to the "yes" square and said, "Union no good. Little work." Pointing to the "no" square, he stated, "[T]he Company is good. A lot of work here."<sup>192</sup> Moreover, two hours after the election on December 10, 1976, Surak addressed a group of employees exclaiming "no friends, no amigos" and using the word "immigration."

189. 672 F.2d 592 (7th Cir. 1982), cert. granted, 51 U.S.L.W. 3646 (U.S. Mar. 7, 1983) (No. 82-945).

190. *Id.* at 595.

191. *Id.* at 596; see also *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1189 (1978).

192. 672 F.2d at 596.

The court dismissed the company's contention that the ALJ erred by crediting the testimony of the employees. The only evidence rebutting their testimony was Surak's "uncorroborated and self-serving declarations." The court noted it would reverse the Board for accepting an ALJ's credibility determinations only when such findings are inherently incredible, unreasonable, or in conflict with the clear preponderance of the evidence.<sup>193</sup> Surak's uncorroborated denials, it held, did not meet this standard.

The court then held that Sure-Tan's argument that Surak's statement did not amount to a section 8(a)(1) violation was "similarly without merit."<sup>194</sup> Citing *NLRB v. Gissel Packing Co.*,<sup>195</sup> the opinion stated that while free to predict the economic consequences of unionization, an employer "threatens" his employees when he warns of a negative economic impact without offering an objective basis for the employees to believe the predicted result is not caused solely at the employer's initiative. The court concluded the ALJ was more than justified in holding that Surak's instruction to his employees constituted a threat within the radius of section 8(a)(1).<sup>196</sup> Additionally, the ALJ correctly concluded that Surak improperly interrogated his employees. The court observed that employer questioning may have reasonably induced fear in the workers, causing them to refrain from assisting a union. It held:

Surak's questions about union support, followed by ethnic slurs, inquiries into the employees' immigration status, occasional ascriptions of canine ancestry and other expressions of Surak's anti-union animus are unarguable and flagrant examples of interrogation prohibited by section 8(a)(1).<sup>197</sup>

### Constructive Discharge and INS

The issue of whether Sure-Tan discriminatorily discharged five employees, the court said, turns on an analysis of "constructive discharge" and posits the direct question whether employer disclosure of irregular immigration status of his employees to the INS could constitute an unfair labor practice.

On January 17, 1977, the Regional Director overruled Sure-Tan's objections to the representation election and certified the union as the collective bargaining agent for its employees. A day after receiv-

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193. *Id.* at 597. The ALJ discredited what he considered Surak's hesitant and evasive testimony. The court then noted that after their review of the hearing transcript, they could not conclude that the "ALJ erred in discrediting Surak's uncorroborated and self-serving declarations."

194. *Id.*

195. 395 U.S. 575, 618 (1969); *see also* *NLRB v. Gogin*, 575 F.2d 596, 600-01 (7th Cir. 1978) (interrogation need not be explicitly threatening to be "coercive" under the meaning of the Act).

196. 672 F.2d at 597.

197. *Id.*



ing notice of this decision, January 20, 1977, Surak sent a letter to INS requesting an immigration check of five listed employees. INS agents visited Sure-Tan premises on February 18, 1977, to investigate the immigration status of all Spanish-speaking employees. INS agents arrested the five employees listed for being present in the country illegally. By the end of that day each of the employees, having accepted a grant of voluntary departure,<sup>198</sup> was on his way to Mexico.

Sure-Tan countered the Board's finding of constructive discharge in violation of section 8(a)(1) and 8(a)(3) by arguing that at the time the letter was sent Surak had only "doubts" about his employees' immigration status. Moreover, the "deportation" of these workers was a "proximate result" of their illegal status rather than Surak's letter to the INS.<sup>199</sup> The court rejected Sure-Tan's contentions and affirmed the Board's determination that Sure-Tan's action amounted to constructive discharge.

The court found the great weight of evidence supported the Board's finding that Surak was fully aware of his employees' illegal status in the country.<sup>200</sup> The court began its refutation of the "myth of employer naivete"<sup>201</sup> by noting Surak's conduct before and after the election clearly reflected a bald anti-union animus. This evidence of contemporaneous unfair labor practices, the court stated, is highly relevant in establishing motive under section 8(a)(3).<sup>202</sup> The court then surveyed the record and found ample factual evidence demonstrating Surak's knowledge of the workers' immigration status. First, employees told Surak hours after the election that none of the employees possessed the proper immigration papers. Second, Surak exe-

198. *Id.* at 599 n.11. The court stated: "Contrary to the apparent assumption of the ALJ, the Board, the General Counsel and counsel for Sure-Tan, these employees were *not* deported but instead left the country on a grant of voluntary departure." (Emphasis in original).

199. *Id.* at 599.

200. *Id.* The court acknowledged that in order to establish a section 8(a)(3) violation, "the employer's conduct affecting an employee's hire, tenure or terms of employment must be motivated, at least in part, by anti-union considerations."

201. Counsel for Sure-Tan attempted to avail himself of the "myth of employer naivete" by arguing the Surak brothers did not know of their workers' illegal status (although they did entertain "doubts"). Consequently, when the brothers informed the INS of the workers' immigration status it was due to a sense of civic obligation and not because of anti-union animus. For a discussion of the "myth of employer naivete" see *supra* note 76.

202. See *NLRB v. Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (7th Cir. 1971) (unfair labor practices were "proper" and "highly significant" factors in determining motive); see also *NLRB v. Gogin*, 575 F.2d 596, 604 (7th Cir. 1978) (prior conduct and anti-union animus are important factors in ascertaining motive).

cuted an affidavit, ten days before his letter to INS, stating a confidential source told him several months *before* the election that "these men were illegally here."<sup>203</sup> Finally, Surak's counsel at the time of the election twice admitted in statements filed with the Board in December 1976 that one of the grounds for objecting to the election was that six of the workers were illegally in the country.<sup>204</sup>

The company also challenged the finding of a section 8(a)(3) violation by contending that the letter to the INS did not amount to a "constructive discharge." The court stated "Constructive discharge occurs, and may give rise to a section 8(a)(3) violation, even though the employer does not directly or forthrightly terminate an employee but rather creates working conditions so intolerable that the employee is forced to resign."<sup>205</sup> The court noted that two elements are required to establish constructive discharge in violation of section 8(a)(3). "First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted 'to encourage or discourage membership in any labor organization' within the meaning of section 8(a)(3)."<sup>206</sup>

The court labeled as "specious" Sure-Tan's argument that the alleged status of the workers created the intolerable conditions forcing termination of employment. The court observed:

By putting the INS on notice of these alien employees when it knew of their illegal status, Sure-Tan took action which was the proximate cause of their departure. Indeed, the INS agent who conducted the investigation testified that John Surak's letter "precipitated" his inspection and investigation. Surak, when he sent this letter, surely foresaw and intended the ultimate result of the INS' investigation.<sup>207</sup>

Additionally, the court rebuffed Sure-Tan's assertion that it was legally obligated to disclose the presence of alien employees to the INS. The INA is barren, the court held, of any provision requiring an employer to notify the INS that he employs undocumented workers.<sup>208</sup> Moreover, "an employer has no right to rely on a 'moral obli-

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203. 672 F.2d at 600.

204. *Id.* at 600 n.12. The notion that Surak did not know the immigration status of his workers, the court concluded, "borders on the ludicrous when considered in connection with the prior affidavits of fact."

205. *Id.* at 600. *See also* Cartwright Hardware Co. v. NLRB, 600 F.2d 268 (10th Cir. 1979) (constructive discharge found when an employer creates intolerable working conditions).

206. 672 F.2d at 600 (citing NLRB v. Haberman Constr. Co., 641 F.2d 351, 358 (5th Cir. 1981) (en banc)).

207. 672 F.2d at 601.

208. *Id.* at 601 n.13. The opinion reads:

[A]n alien's illegal status under the INA does not, as Sure-Tan contends, immunize an employer's constructive dismissal of an alien employee which is motivated by anti-union animus. Although an alien's inability to procure proper authorization from the INS to reside and work in the United States might,

gation' to report [undocumented workers] (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of section 8(a)(3)."<sup>209</sup>

The second prong of the *Haberman* test—that the employer has acted with anti-union animus — was also easily met. The employer's conduct had resulted in section 8(a)(1), 8(a)(3), and 8(a)(5) violations which evidenced an illegal course of action tending to discourage its employees from supporting the union. The close time relationship between the receipt of the certification notice and the letter to the INS also illustrated Sure-Tan's motives. The court wrote:

Sure-Tan's deathbed conversion to enthusiastic enforcement of the immigration laws, which, of course, coincided with the Union's victory in the representation election, can hardly provide it with any defense under section 8(a)(3). In fact, in this case as probably in others the immigration laws have provided an employer with a powerful tool for unfair and oppressive treatment of migrant labor. The immigration laws have been conveniently employed to impose the ultimate penalty of discharge (and deportation or its equivalent) if migrant laborers should have the effrontery to join a union.<sup>210</sup>

The opinion made clear that an employer's transparent appeal to "civic duty" and "moral obligation" under the INA cannot justify conduct directed toward discouraging undocumented workers from assisting or supporting a labor organization. The court candidly recognized the reality of this clandestine labor market where there is "nothing like a successful union election to concentrate an employer's mind on the color of its workers' visas (if they exist) and on its moral obligations to expel its (once faithful) employees from the

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standing alone, constitute sufficient grounds for discharge, there is no authority under either the NLRA or the INA sanctioning a constructive discharge which is otherwise invalid under section 8(a)(3), based on the employee's status as an [undocumented worker]. Even if the instant case could properly be classified as a "mixed motive" case because of the presence of a potentially justifiable reason for the constructive discharge, we believe that the General Counsel clearly sustained his burden of demonstrating an illegal motive under the Act for Sure-Tan's conduct, and Sure-Tan has not rebutted this evidence. Specifically, Sure-Tan has not shown that absent anti-union animus, it would have engineered these employees' departures . . . .

209. *Id.* at 601. The court went on to observe:

We are not so naive as to believe that Sure-Tan does not share some practical blame in this case for any alleged violation of the immigration laws. We find it difficult to believe that a metropolitan Chicago employer can employ a work force almost exclusively made up of Spanish-speaking men of Mexican origin at wages within pennies of the minimum wage (and at hard and unappetizing work) without even suspecting that some of these employees are [undocumented workers].

*Id.* at 601 n.14.

210. *Id.* at 602.

country.”<sup>211</sup>

Sure-Tan, in its brief before the Supreme Court, advanced a First Amendment defense against the finding of constructive discharge.<sup>212</sup> Relying on the recently decided case of *Bill Johnson's Restaurants, Inc. v. NLRB*,<sup>213</sup> the company contends that its request that INS investigate the immigration status of its workers is a protected exercise of its right to petition the government for redress. Hence, its instigation of an INS investigation, even if prompted by a retaliatory motive, cannot be construed as constructive discharge because it was constitutionally protected given that a reasonable basis exists for the initial communication with the INS.

The company's reliance on *Bill Johnson* as authority for its “right to petition” argument is misplaced. In that case, the Supreme Court was presented with the issue of whether the Board could enjoin the prosecution of a state court civil suit brought by an employer for retaliatory purposes, without a finding that the suit lacked reasonable basis.<sup>214</sup> The Court noted that sections 8(a)(1) and (4) are “broad, remedial provisions that guarantee that employees will be able to enjoy their rights secured by [section] 7 of the Act . . .”<sup>215</sup> The opinion, however, recognized the existence of “weighty countervailing” considerations against allowing the NLRB to find that the filing of the suit was an unfair labor practice. The Court was sensitive to the First Amendment values encased in the right to petition for both the individual and the states. With respect to the individual, the abridgement of judicial access by NLRB injunction “will totally [deprive the person] of a remedy for an *actual injury*.”<sup>216</sup> Additionally, the states have a substantial interest “in protecting the health and well-being of its citizens.”<sup>217</sup> Because of these concerns, the Board will be allowed to enjoin a state civil action only where the suit lacks a reasonable basis.

The *Sure-Tan* facts are readily distinguishable from the operative facts and legal concerns of *Bill Johnson*. First, the company cannot cite an “actual injury” for which redress is necessary. The undocumented workers' presence in the country cannot reasonably be construed as injurious to the company. Second, the underlying federalism concerns that form the *Bill Johnson* decision are totally absent in this case. Even assuming a generalized First Amendment right to report “illegal aliens,” that right is only narrowly limited to the ex-

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211. *Id.* at 601 n.14.

212. For a summary of *Sure-Tan's* argument see 52 U.S.L.W. 3204 (U.S. Sept. 7, 1983) (No. 82-945).

213. 51 U.S.L.W. 4636 (1983) (U.S. May 31, 1983) (No. 81-2257).

214. *Id.*

215. *Id.* at 4638.

216. *Id.* at 4639 (emphasis added).

217. *Id.* (citing *Farmer v. Carpenters*, 430 U.S. 290, 302-303 (1977)).

tent its exercise directly constitutes an unfair labor practice. The employer is *not* otherwise restricted by labor law from requesting an INS investigation of his workers. Consequently, *Bill Johnson* does not immunize Sure-Tan's actions from a constructive discharge finding.

### *Remedies and Undocumented Workers*

The most difficult issue presented in *Sure Tan II* is the problem of fashioning an appropriate remedy for the five constructively discharged employees. In sharp contrast to the ALJ's, Board's, and Seventh Circuit's concurrence of analyses with regard to employee status and the unfair labor practices, all three tribunals diverged in formulating the appropriate remedy. The various administrative remedies will be briefly reviewed, and the Seventh Circuit's opinion will be analyzed in some detail.

The ALJ started with the basic premise that undocumented workers are employees within the meaning of the NLRA and are entitled to the conventional remedies of backpay and reinstatement.<sup>218</sup> These remedies, however, seemed "inadequate since being physically unavailable for employment nullifies any backpay liability and their inability to return to the United States renders reinstatement at best an unlikely prospect."<sup>219</sup> The ALJ presumed that "illegal aliens" were unavailable for work because of their voluntary departure; nonetheless, he ordered reinstatement to remain open for six months so that the workers could be given an opportunity to return *legally*.<sup>220</sup> The ALJ declined to award backpay but invited the Board to consider the awarding of limited backpay because, in part, "without an award of some backpay, the violations herein will largely go unremedied and the Employer may be encouraged to adopt an apparently foolproof system of defeating union organizational

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218. *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1192 (1978).

219. *Id.* The ALJ appears to have indulged in a conclusory legal presumption that the deported workers could not return under proper legal authority and that their "physical" availability (irrespective of legal status) was not sufficient to trigger the remedial provisions of the NLRA.

220. Given the immense backlog in processing Mexican visa applications, the notion that these workers could return legally within six months verges on the ridiculous. See generally SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, STAFF REPORT, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST § III (1981) (noting "[b]acklogs for some groups from certain countries mean delays of over a decade . . .") *Id.* at 355. Immigrants seeking legal admission from Mexico are particularly susceptible to long delays.

attempts.”<sup>221</sup>

The Board differed with the ALJ as to the appropriate remedy.<sup>222</sup> The NLRB took issue with the ALJ’s departure from conventional remedies for section 8(a)(3) violations, and deemed his analysis of the remedy as “unnecessarily speculative.”<sup>223</sup> The Board noted that while it was not disputed that the employees were deported, nevertheless, the record was devoid of evidence establishing that they had not returned to the United States. The Board refrained from determining the exact scope of remedies, instead it held that the appropriate forum to determine the availability of the worker and the proper remedy was the compliance proceeding.

### Operational Conflict

On September 7, 1978, the General Counsel filed a Motion for Clarification,<sup>224</sup> contending the Board’s Order did not distinguish between the legal and the illegal status of the discriminatees and thus was inconsistent with national immigration law and policy. The General Counsel argued the Board’s order encouraged the deported employees to return to claim their jobs and backpay in violation of United States immigration law. Consequently, reinstatement should be offered only to discriminatees who are able to re-enter the United States legally, and backpay should accrue only from the time a lawfully returned worker is denied employment.

The General Counsel, of course, conceded this restrictive reading of the Board’s relief would leave only the cease-and-desist provisions as a remedy in most cases involving deportation.<sup>225</sup> The General Counsel advanced the argument that a conflict between the NLRA and the INA exists at the “operational level.”<sup>226</sup> This “operational” conflict argument holds that if a Board remedy induces undocumented workers to re-enter the country in violation of INA criminal sanctions,<sup>227</sup> then the labor award and the INS enforcement policy

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221. 234 N.L.R.B. at 1193.

222. *Id.* at 1187. The Board observed that while the ALJ commenced his analysis with the settled proposition that undocumented workers are employees within the meaning of the Act, nevertheless, his recommended “Order departs significantly from the conventional remedy for a violation of Section 8(a)(3).”

223. *Id.*

224. *See* *Sure-Tan, Inc.*, 246 N.L.R.B. 788 (1979).

225. *Id.*

226. *See generally* Note, *Retaliatory Reporting of Illegal Alien Employees: Remediating the Labor-Immigration Conflict*, 80 COLUM. L. REV. 1296 (1980).

227. INA § 275, 8 U.S.C. § 1325 (1982). The INA provision said to be violated by a labor award that induces deported workers to re-enter the United States reads in pertinent part as follows:

An alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact,

are in conflict. Because of its limiting affect on the Board's use of traditional remedies, the exact premises and scope of the argument must be ascertained.

The "operational" conflict argument is premised on the notion that an undocumented worker's reentry is a violation of criminal law and significantly impedes INS enforcement efforts. First, section 275 of the INA states that an immigrant who enters without inspection may be subject to conviction of a misdemeanor.<sup>228</sup> Only if the alien is convicted and re-enters is the uninspected entry deemed a felony. Since in the vast majority of cases Mexican undocumented workers are deported without prosecution under section 275, the possibility of re-entry constituting a felony is insignificant. This points out the fact that INS enforcement policy is not focused on enforcing section 275. Of the 896,929 persons apprehended in 1979, only 12,371 were convicted of illegal entry.<sup>229</sup> Second, the surreptitious entry does not necessarily mean the immigrant is in violation of criminal law once he arrives in the interior. As noted by the court in *United States v. Rincon-Jimenez*,<sup>230</sup> once the alien has perfected entry, the violation may cease.<sup>231</sup> Consequently, an undocumented immigrant who has reached the interior of the United States is in all likelihood not in violation of this provision.<sup>232</sup> Third, the "operational" conflict between the INA and the NLRA is limited to cases in which the discriminatee workers have actually been deported and returned without inspection. If the workers still remain in the United States, the application of section 275 is precluded. In *Apollo Tire*, for example, the discharged workers were not deported nor was the INS directly involved. Additionally, even if deported, workers can return to the

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shall, for the first commission of any such offenses, be guilty of a misdemeanor . . . and for a subsequent commission of any such offenses shall be guilty of a felony . . . .

228. *Id.*

229. 1979 ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 15, 21.

230. 595 F.2d 1192 (9th Cir. 1979).

231. In determining that a conviction for section 275(2) was barred by the applicable statute of limitations, the court noted that the offense was "consummated at the time the alien gains entry . . . ." *Id.* at 1193-1194. The court explicitly declined to make violation of section 275 a continuing offense. *Id.* at 1194.

232. Note, *Illegal Aliens And Enforcement: Present Practices And Proposed Legislation*, 8 U.C.D. L. REV. 127, 148-149 (1975). Noting that section 275 does not make "illegal" presence a crime, the author states: "Since being in the United States 'illegally' is neither a felony nor a misdemeanor, an alien who is apprehended after having completed entry into the country is only subject to deportation, not criminal prosecution." (Citations omitted).

United States under a temporary legal arrangement. They could acquire an illegal status by overstaying the authorized visa period without necessarily violating section 275.<sup>233</sup>

The scope of the operational conflict argument is limited to a set of specific remedies that impel the violation of an INA criminal provision. This contention presupposes that the immigration law concerns surrounding section 275 are settled and unambiguous. This simplistic presumption, however, fails to account for the lack of INS enforcement of the provision and for the complexities of whether an undocumented person's presence in the interior of the country constitutes a continuing violation of that section. Hence, the Board has demonstrated well-founded caution in declining to enter this area of immigration law.

The Board rejected the General Counsel's argument, noting the charging party's counter-argument that without adequate remedies the employer could simply replenish his work force with other undocumented workers, thus creating a strong incentive for illegal immigration. The NLRB denied the motion concluding the "remedial policies of the Act will be best effectuated . . . by affording the discriminatees full protection notwithstanding the circumstances attendant to their illegal discharge."<sup>234</sup> The discriminatees were to be offered unconditional reinstatement and the backpay period was to run from the discriminatory loss of employment to the bona fide reinstatement offer or other appropriate tolling of that liability. Employees who were located but found to be unavailable for work (including unavailability because of enforced absence from the country) would have their backpay tolled.<sup>235</sup>

The Board noted the *Apollo Tire* court enforced its reinstatement and backpay order without regard to the fact that the workers were in the country unlawfully. Moreover, this was consistent with that court's admonition that the Board not "delve into immigration matters, out of its field of expertise."<sup>236</sup> Additionally, the NLRB felt the Court in *Southern S.S. Co.* found an abuse of discretion because the congressional intent underlying the anti-mutiny statute was clear and unambiguous and the strikers' criminal conduct held a serious potential for violence. Such was not the case here, so its order for "reinstatement and compliance hearing to develop a factual record is not so incompatible with immigration law so as to render it an abuse

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233. The entry into the United States under inspection and pursuant to an authorized nonimmigrant classification, could result in a deportable status if the conditions and time periods of the visa are not observed. Therefore, a person could have an illegal status without having violated section 275.

234. *Sure-Tan, Inc.*, 246 N.L.R.B. 788, 788 (1979).

235. *Id.* (citing 3 NLRB CASEHANDLING MANUAL § 10584.2 (1977)).

236. 246 N.L.R.B. at 788 n.7; see also *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979).



of [its] discretionary authority under the rule of *Southern Steamship*.<sup>237</sup>

The *Sure-Tan II* court initiated its analysis of the remedy issue by discussing the propriety of backpay and reinstatement in situations involving deported discriminatees. The court rejected the company's argument that an award of reinstatement and backpay "cannot be reconciled with the laws and policies governing both immigration and labor relations."<sup>238</sup> Sure-Tan's argument was premised on the assumption that the discriminatees were deported, and thus the Board's order encouraged re-entry which would constitute a felony under immigration provisions.<sup>239</sup> The court correctly pointed out, however, that the INS did not deport the workers; rather, the INS granted them *voluntary departure* with the result that the INA felony provisions for re-entry were inapplicable.<sup>240</sup> The importance of a grant of voluntary departure is that the return of the discriminatees does not place *them* in violation of felony criminal provisions. Even though the Board's remedies did not *require* the commission of a criminal act by the discriminatees, it is nevertheless contended that the very existence of these remedies fuels violations of misdemeanor INA provisions and regulations by encouraging re-entry. The court addressed this issue as follows:

[A]s a practical matter we believe it unlikely that a discriminatee would attempt to illegally enter the United States primarily to pursue his remedies and thus draw attention to his [undocumented] status. Indeed, the economic and social attractions which generally encourage illegal immigration to this country are probably more compelling inducements than the special fruit of the Board's order might be in this case.<sup>241</sup>

The purposes of the NLRA, Sure-Tan then asserted, were not furthered by the imposition of these remedies. The company drew attention to a line of cases which denied reinstatement to employees

237. 246 N.L.R.B. at 789. For a discussion of the rule of *Southern Steamship Co.* see *supra* text accompanying notes 168-179.

238. NLRB v. Sure-Tan, Inc., 672 F.2d 592, 603 (7th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3646 (U.S. Mar. 7, 1983) (No. 82-945).

239. 8 U.S.C. § 1326 (1982). Deported aliens must first obtain the Attorney General's consent for reapplication for admission before they can re-enter the United States. Failure to comply with this provision makes subsequent re-entry a felony.

240. 672 F.2d at 603. The court reasoned as follows:

[T]he INS did not *deport* the discriminatees; rather, the INS granted to them the privilege of *voluntary departure* . . . Aliens who depart voluntarily avoid the stigma of deportation and enhance the possibility of their lawful return to the United States at a later date. . . . Because these discriminatees were not deported, the felony provisions of 8 U.S.C. § 1326 are not applicable . . . .

(Citations omitted)(emphasis in original).

241. 672 F.2d at 603-604.

guilty of unlawful or offensive behavior.<sup>242</sup> The court explained, however, that the offensive or unlawful behavior must have a direct nexus to the employee's ability to perform work responsibilities or to the compatibility between the employer and the worker. The court determined that discriminatees' immigration transgressions, though unlawful and possibly offensive, do not relate directly to their ability to perform work, nor do they adversely affect employer-employee relations.

Furthermore, the court emphasized that the purpose of backpay is to vindicate public policy by making employees whole for their losses caused by the employer's unfair labor practices.<sup>243</sup> The court went on to state:

It would be anomalous to encourage the honest toil of [undocumented workers] accepting it with the understanding that these workers had the rights of employees under the Act, but then, when violations occur, to deny them such rights by refusing effective remedies. Indeed, the rights of *both* alien and non-alien employees under the Act are flouted if employers are free to discriminate against alien employees who exercise their right to form and join unions.<sup>244</sup>

Noting that this was precisely what happened in *Sure-Tan II*, the court affirmed that both reinstatement and backpay were justified to advance the policy of the NLRA and to deter similar misconduct in the future.<sup>245</sup> This conventional remedy, the court cautioned, must nevertheless be subject to limitations given the peculiar immigration status of the discriminatees.

#### Mandatory Backpay and Legal Presence

The court, in analyzing whether *Sure-Tan's* offer of reinstatement was conditional or unconditional, reached the conclusion that the Board's reinstatement order must be modified. *Sure-Tan* had mailed letters to the discriminatees offering to reinstate the discriminatees "provided . . . [their] reemployment shall not subject *Sure-Tan, Inc.*, to any violations of United States immigration laws."<sup>246</sup> The ALJ found the offer deficient because it afforded the employees only twenty days or less to legally enter the United States to reclaim their jobs and because there was no evidence to verify that the workers received the offer.<sup>247</sup> The Board found "the [employer's] offers were

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242. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *Nebraska Bulk Transport v. NLRB*, 608 F.2d 311 (8th Cir. 1979); *NLRB v. Nat'l Furniture Mfg. Co.*, 315 F.2d 280 (7th Cir. 1963). For an analogous argument see Comment, *Illegal Aliens as "Employees" under the National Labor Relations Act*, 68 GEO. L.J. 851, 866-869 (1980).

243. 672 F.2d at 604.

244. *Id.*

245. *Id.*

246. *Id.* at 604.

247. *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1192 (1978).

deficient because they were expressly conditioned on [Sure-Tan] not being found in violation of United States immigration law."<sup>248</sup>

The Seventh Circuit Court reasoned that Sure-Tan was correct in arguing that the condition in its letter was not a legal impediment to reinstatement. The discriminatees could be hired without placing the company in violation of United States immigration laws. Moreover, in determining whether a reinstatement offer is conditional, the focus is on the "understanding of an alleged condition by discriminatees who received the reinstatement offers."<sup>249</sup> In this case, the court held the discriminatees were cognizant that they needed proper authorization to work in the United States; thus, the condition in "Sure-Tan's letter would in all likelihood be construed by persons in the position of these discriminatees as requiring them to enter the country legally before seeking reinstatement."<sup>250</sup> From this premise the court extrapolated that reinstatement would be required only if the discriminatees are *legally* present and duly authorized to be employed. The court, nonetheless, ordered that the reinstatement offer remain open for seven years because it could take years to secure legal entry. Noting that under the circumstances the discriminatees may not be entitled to any backpay, the court stated:

It seems to us that it would better effectuate the policies of the Act to set a minimum amount of backpay which the employer must pay in any event, because it was his discriminatory act which caused these employees to lose their jobs . . . [W]e think the Board could fix a time which is the minimum during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice. Although that period of time is obviously conjectural, we think that six months is a reasonable assumption.<sup>251</sup>

The court concluded by affirmatively holding that six months of backpay is a minimum amount to effectuate the policies of the NLRA.

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248. *Id.* at 1187 n.3.

249. 672 F.2d at 604.

250. The court's analysis of whether Sure-Tan's offer was "conditioned" does not support its conclusion that the discriminatees "may not enter the United States to claim these jobs without proper documents." *Id.* at 605-606. It is important to note that immigration law does not prohibit the employer from offering employment to an undocumented worker, nor does it sanction that worker for accepting it. Moreover, if the discriminatees in this case effectuate an illegal entry they have not committed a felony; rather, they may have violated an INA misdemeanor provision and may be subject to deportation. See 8 U.S.C. §§ 1324-1325 (1982). Although an undocumented worker remains subject to detention, there are no substantive INA provisions compelling the worker to be "legally" in the country before availing himself of Board remedies.

251. 672 F.2d at 606.

## Critique and Alternative Remedies

The remedy fashioned by the *Sure-Tan II* court is deficient because it is at once too sweeping and excessively narrow. The court appears to dismiss the antinomy argument in its holding of NLRA coverage and availability of conventional remedies to undocumented laborers. In formulating the appropriate remedy, however, the court seems to accept the notion of an "operational" conflict between the NLRA and the INA. Without identifying the locus of this conflict, the court derives a substantive legal requirement of lawful status from the presumed understanding of the reinstatement offer by the discriminatees. This requirement of legal presence unnecessarily limits the scope of conventional labor law remedies and is procedurally and substantively suspect.

Under the *Sure-Tan II* rationale, relief in the form of reinstatement is practically denied to undocumented workers whose rights under the NLRA have been violated. The preservation of the essential employer-employee relationship is promoted by reinstatement which is in the nature of an "affirmative" remedy. This affirmative remedy is effectively foreclosed because undocumented workers are not likely to have the requisite familial or occupational nexus to the United States that is required for permanent resident alien status. Furthermore, even with proper legal basis for an immigration claim, INS bureaucratic lethargy<sup>252</sup> as well as the visa backlog will result in the undocumented worker not being able to secure legal status even within the seven years prescribed by the court. Hence, the court's remedy, allowing for reinstatement within seven years if legal presence is established, is ineffective.

The reinstatement remedy is too narrow to accomplish its purpose of making the employee "whole." At a minimum the remedy should allow for the continuation of the reinstatement obligation until such time as the alien has acquired legal status. Using a procedure parallel to that developed for employees whose enlistment in the armed services precludes immediate reinstatement, the reinstatement offer should remain open for ninety days after legal admittance.<sup>253</sup> The employee must apply for reinstatement within that time period and the employer is obligated to respond with a reinstatement offer within five days. This approach has the virtue of keeping the reinstatement offer open until the discriminatee is in a position to accept it.<sup>254</sup>

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252. See the recent Supreme Court case which held that an 18-month INS delay in rendering a decision in an I-130 application is not affirmative misconduct justifying an estoppel. *Miranda v. INS*, 51 U.S.L.W. 3358 (1982).

253. See Note, *supra* note 226, at 1310; see also 3 NLRB CASEHANDLING MANUAL § 10528.14 (1977).

254. Board policy does not allow the setting of rigid general deadlines for the ac-

The legal presence prerequisite also complicates the backpay portion of conventional labor law remedies. In most instances the apprehended undocumented worker would be almost immediately unavailable because of forced absence from the country, thus tolling backpay liability. For the reasons listed above, it will probably be difficult to acquire legal status and become reavailable. Consequently, the undocumented discriminatee could be left without *any* remedy. Perceiving this possibility, the court correctly imposed a mandatory backpay remedy. The six-month backpay period appears to meet the conflicting legal dictates of the NLRA. The award seems to be large enough to substantially restore status quo, yet not so large as to be oppressive under the circumstances.<sup>255</sup> The award can be empirically justified as representing the general time period that most undocumented workers remain employed in this country before departing to Mexico.

The legal presence requirement with authorized employment imposed by the *Sure-Tan II* court is too sweeping given the posture of the case and the doctrine of accommodation. Unfair labor proceedings are usually bifurcated into distinct stages, and issues germane to one stage may not be relevant in another.<sup>256</sup> In the initial stage, the Board makes policy determinations and ascertains culpability.<sup>257</sup> In the second stage, the so-called "compliance" proceeding, the Board usually calculates the backpay owed and passes on unresolved reinstatement issues.

The *Sure-Tan II* case involved the first stage of the unfair labor proceeding. The court properly discussed issues of coverage and the availability and propriety of remedies. After deciding these issues in

ceptance of reinstatement offers. Rather, it requires that each discriminatee be given sufficient time to accept the offer in view of the particular circumstances of each case. 3 NLRB CASEHANDLING MANUAL § 10528.14 (1977).

255. The Supreme Court has suggested that the requirement that remedies be fashioned to effectuate the policy of the NLRA precludes backpay awards that are oppressive under the circumstances. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953).

256. See e.g., *Handy Andy Inc.*, 228 N.L.R.B. 447 (1977) (holding that evidence of past practices of racial discrimination by a union need not be considered at a certification proceeding; the Board noted such allegations could best be handled in an unfair labor practice proceeding), *approved in Bell & Howell Co. v. NLRB*, 598 F.2d 136 (D.C. Cir.) (Bazelon, J.), *cert. denied*, 442 U.S. 942 (1979); *Local Union No. 393, United Assoc. of Journeymen & Apprentices*, 232 N.L.R.B. 644 (1977) (holding that evidence of discrimination need not be considered in §§ 8(b)(4)(D) and 10(k) work dispute proceedings; the Board again urged that unfair labor practice proceedings provide a more suitable setting for such allegations).

257. National Labor Relations Act, § 10(c), 29 U.S.C. § 160(c) (1976). See *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 411 (1960) (Frankfurt, J., concurring).

favor of coverage and recognizing the general applicability of conventional remedies, the court then attempted to address the immigration issues by imposing a general legal presence requirement. While this requirement can be cast as a "policy" question, the conflict between immigration law and particular labor law remedies should only be assessed at a forum where the concrete facts can be adduced. This minimizes the need for Board interpretation of immigration law, and it places any needed construction of the INA within a frame of specific facts.

The *Sure-Tan II* court's legal presence requirement is deficient in several regards. First, the legal basis for the requirement is vague and tenuous. The precise areas of conflict need to be specifically defined so the rights of undocumented workers under the NLRA can be fully protected within the limitations imposed by immigration law. Second, the legal presence with authorization to work requirement could result in the denial of these remedies to undocumented aliens who are in the country under color of law but who are not "authorized" to work.<sup>258</sup> Also, what constitutes legal presence with authorization to work can be a complicated legal determination which the Board is ill-prepared to render. Moreover, it will *not* do to defer these questions to the INS because they may take years to issue a decision which, in some cases, may be further delayed by appeals. Finally, the legal presence requirement is not supported by the doctrine of accommodation. The Board has the duty to be attentive to the mandates of the NLRA and to issue remedies that effectuate the policy of the Act. The traditional remedies of backpay and reinstatement, which the court found were available in this context, should be used and modified only to the extent there is an "actual" conflict between the remedy and the INA. This can only be determined at a compliance proceeding.

The *Sure-Tan II* court's analysis of the status and scope of protection of undocumented workers under the NLRA supports the formulation of a more coherent remedy than the one it advanced. The initial premise would be the well-supported principle that undocumented workers are to be treated like other protected workers. Because the general policy issues would be set, the initial stage would involve the issue of culpability. At the compliance proceeding, issues of immigration law conflict should be addressed. If workers are not deported at that time, conflict between the NLRA and immigration law should not pose a problem. For workers who are deported, however, no prior immigration restrictions should be im-

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258. See 8 C.F.R. § 109 (1983). Unauthorized employment goes to the issue of deportability and not to questions of criminal violations of the Immigration and Nationality Act.

posed. The legal presence requirement would compel the Board to make complicated immigration determinations at the initial hearing, before the exact nature of the conflict is determined. Instead of imposing a "legal" presence obligation on the worker, the burden should be on the employer to establish that the discriminatee is currently in violation of an INA criminal provision or is violating any applicable provision prohibiting his employment. General questions of deportability are not germane because INS enforcement is not legally impeded by Board remedies.<sup>259</sup> If the remedy would cause the worker to violate a specific criminal or employment prohibition, then the remedy must be altered to eliminate the conflict. If the worker is unable to attend the compliance proceeding because of forced absence from the country, then a six-month mandatory backpay remedy should be awarded for the reasons discussed above.

The guiding principle of this formulation would be the minimizing of conflict between the NLRA and the INA by eschewing sweeping requirements. While the Board must be attentive to "operational" conflicts, it should delve into this matter only when an actual conflict is presented by the facts of the case. The Board incursions into immigration matters would thus be limited to what is necessary, and the economic rights of undocumented workers would be protected to the fullest extent while still respecting the integrity and independence of the INA as required by the doctrine of accommodation.

#### CONCLUSION

A survey of social research on the question of illegal migration draws into question many of the popular misconceptions regarding its alleged adverse impact. Empirical research has failed to substantiate the persistent claims that undocumented workers cause unemployment. The secondary labor market jobs performed by these workers provide too little remuneration and opportunity for upward mobility to be attractive to native workers. Additionally, improvement of wage levels and work conditions, which the undocumented workers allegedly depress, may just as easily result in business shut-downs or mechanization, rather than greater job opportunities for domestic workers or improved working conditions. Apocryphal notions about the untoward consequences of illegal migration should

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259. See *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1142 (9th Cir. 1981) (though aliens could exercise rights protected by the NLRA, that fact did not bear on their deportability under immigration laws even if their employer's unfair labor practice precipitated the discovery of illegal status).

not be allowed to color the legal analysis of such aliens' coverage and protection under the NLRA.

The INS enforcement policy is focused on the workplace and is infused with a potentially disruptive effect on concerted activity. In numerous instances, the INS raids are timed to interfere with union elections or are prompted by calls from employers disgruntled with the workers' desire for a union. On other occasions, interference results from the INS general enforcement policy which was designed to open employment opportunities.

Ascertaining the legal coverage and protection of undocumented workers under the Act is complicated by the workers' ambiguous economic and social role in our society. The growing presence of these workers in various industrial sectors, however, makes the determination of their rights increasingly urgent. The questions of whether undocumented workers are "employees" under the NLRA and, if so, the appropriate relief to be extended to them for unfair labor practices, are critical in determining their effective rights under our labor laws. This is especially true since the unionization of undocumented workers could prove to be one of the most important developments in immigration in this decade. The participation of undocumented workers in trade unions could structurally alter their position in the United States, giving them the institutional base from which to protect their economic and civil rights and from which to improve the wages and working conditions of the secondary labor market.

The answer to the threshold question of whether undocumented workers are "employees" within the NLRA determines whether these workers will have meaningful participation in industrial life. The Board has consistently maintained a policy of according aliens, both legal and undocumented, employee status. Although characterized by undeveloped reasoning, the Board's decisions show an awareness that formal distinctions based on immigration status could potentially undermine the purposes of the Act. Both the Seventh and the Ninth Circuits have affirmed the Board's longstanding and consistent policy of extending NLRA protection to undocumented workers. Both circuits were concerned with the ability of the employer to immunize himself from unionization should undocumented workers be excluded from coverage. If these workers were legally foreclosed from forming or assisting unions, employers would be encouraged to continue employing undocumented workers in order to subvert the policies embodied in the NLRA. With regard to immigration-law based objections to NLRA employee status, both courts held that the NLRA and the INA were not inconsistent. The INA does not prohibit undocumented persons from working nor does it prevent an employer from hiring them. Both opinions expressly held that refusing to protect undocumented workers under the NLRA would pro-



vide an extra incentive for continued INA violations. Critics of these opinions, nevertheless, vigorously argue that the courts' initial acceptance of the policy consonance between the NLRA and INA is fallacious. Rather, a basic antinomy exists between the policies of the INA, which is concerned with safeguarding domestic labor, and the current Board policy of extending protection to foreign workers.

The antinomy argument is deficient because of its confused interpretation of immigration law and its misguided understanding of the doctrine of accommodation. Advocates of this argument construe section 212(a)(14) of the INA as creating a presumption that an alien employed within the United States is illegal absent compliance with that provision. The fundamental flaw with this contention is that section 212(a)(14) is given a scope and meaning for labor law purposes which it does not command in immigration law. This section deals with the exclusion of aliens, an area in which Congress has been given wide latitude. Aliens who have entered the country, however, are not subject to exclusion provisions and have been accorded rights in both deportation and non-deportation settings. Proponents of the antinomy position attempt to prohibit the employment of undocumented workers by drawing a "presumption" from a non-applicable INA provision.

Furthermore, the fact that the NLRB must accommodate competing federal immigration law does not justify the exclusion of undocumented workers from the aegis of the NLRA. Adherents of the antinomy argument assert that the extension of NLRA protection to these employees impedes the administration of our immigration laws to an unacceptable degree. This contention, however, misunderstands the measure of accommodation required of the Board in an area under its statutorily mandated responsibility. While the Board must strive to minimize interference with immigration law, it must nevertheless apply its own policy in determining the coverage and scope of protection afforded undocumented workers under the NLRA.

The ingression of undocumented workers is a social phenomenon of long historical standing. Their importance to critical economic sectors strongly suggests this illegal circulation of labor will continue as long as they remain legally vulnerable to exploitation. Consequently, labor law doctrine should recognize the legitimate right of these workers to organize unions in order to improve abject working conditions and dismally low wages. If the statutory protection of the NLRA is extended to undocumented workers, then economic vulnerability can be minimized, thus potentially reducing the utilization of

these workers and improving the working conditions and wage-levels of all workers.